STATE OF MICHIGAN

IN THE SUPREME COURT OF MICHIGAN

AUDREY TROWELL,

Plaintiff/Appellee,

Michigan Supreme Court No:

Court of Appeals No: 327525

Oakland County Circuit Court
Lower Court No: 14-141798-NO
HON. COLLEEN A. O'BRIEN

-vs-

PROVIDENCE HOSPITAL AND
MEDICAL CENTERS, INC.,
a Michigan Non-Profit Corporation,

Defendant/Appellant.

/

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/

DEFENDANT/APPELLANT PROVIDENCE HOSPITAL AND MEDICAL CENTERS, INC.'S APPLICATION FOR LEAVE TO APPEAL
ORAL ARGUMENT REQUESTED
PROOF OF SERVICE

SUBMITTED BY:

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

COURT RULES

JURISDICTIONAL STATEMENT AND ORDER APPEALED

Pursuant to MCR 7.303(B)(1), MCR 7.305(B)(3), and MCR 7.305(B)(5)(a), the Supreme Court of Michigan has jurisdiction as this case "involves legal principles of major significance to the state's jurisprudence" and the Court of Appeals' "decision is clearly erroneous and will cause material injustice."

Defendant/Appellant Providence Hospital and Medical Centers, Inc. (hereinafter Providence Hospital) appeals the Court of Appeals decision issued and released on August 16, 2016.

Specifically, the Court of Appeals held: (1) the trial Court erred by granting Defendant/Appellant summary disposition because Plaintiff/Appellee's Complaint was too vague and ambiguous to discern whether it sounded in medical malpractice or ordinary negligence; (2) summary disposition was improper because Plaintiff/Appellee's Complaint was too vague to determine whether medical judgment was involved in making staffing decisions regarding the number of nurses or nurses' aides necessary to assist a patient in the Intensive Care Unit (ICU) with ambulation to the bathroom; and (3) summary disposition was erroneous where Plaintiff/Appellee's Complaint was too ambiguous to determine whether medical judgment was necessary in deciding the manner or technique used to assist/transfer Plaintiff/Appellee to the bathroom.

The Court of Appeals' Opinion conflicts with the Michigan Court Rules as promulgated by this Court, specifically MCR 2.111(B)(1), as the Court of Appeals has concluded that Plaintiff/Appellee's Complaint is so vague that the Court cannot ascertain whether Plaintiff/Appellee has plead medical malpractice or ordinary negligence, or whether medical judgment is necessary to resolve the allegations therein, therefore the Court of Appeals has

remanded the case and ordered the parties to engage in discovery to flush out exactly what Plaintiff/Appellee is alleging.

Defendant/Appellant filed a Motion for Summary Disposition pursuant to MCR 2.116 (C)(7) for violation of the statute of limitations and (C)(8) for failure to state a claim, thereby restricting review of the allegations in Plaintiff/Appellee's Complaint to the four corners of said Complaint. Nevertheless, the Court of Appeals held "We cannot conclude solely on the basis of the allegations in the complaint, . . . that plaintiff's claims sounded in medical malpractice. . . . Further, factual development is required to properly ascertain whether plaintiff's claims sounded in medical malpractice or ordinary negligence. . . ." *Trowell v Providence Hosp and Med Ctrs, ____ Michigan App____ ; ____ NW3d ____ (2016) (Docket No. 327525) p. *32.* (Exhibit A)

The Court also commented, "absent documentary evidence and illumination from the complaint, we simply cannot ascertain whether the instant case is [within the realm of common knowledge] or whether medical expertise and judgment must be contemplated. . . The allegations in the complaint, alone were inadequate to serve as a basis to summarily dismiss plaintiff's action. . . . ." [1] *Trowell, Id.* at 26. (Exhibit A)

An order/directive to conduct discovery to determine the nature of the Complaint makes null and void this Court's mandate that the pleader must "stat[e] the cause of action, with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend." MCR 2.111(B)(1).

Plaintiff/Appellee's Complaint alleged that she was admitted to Defendant/Appellant's hospital for treatment of an aneurysm that caused a stroke. She further alleged that the stroke

[1] The issue of vagueness or ambiguity of the Complaint was introduced into this matter by the Court of Appeals and therefore, necessarily must be addressed as it appears from the Opinion that the Court of Appeals reversed the trial court because the Court of Appeals could not discern what Plaintiff/Appellee was pleading. Defendant/Appellant opines that Plaintiff/Appellee's Complaint is not vague, but rather, the allegations sound in medical malpractice. Nevertheless, since the Court of Appeals found the Complaint ambiguous, reversal and remand on the basis of an inability to determine the nature of the claim improperly nullifies MCR 2.111(B)(1).

caused her to go into cardiac arrest, thereby necessitating admission into the ICU. (Exhibit B, ¶¶ 5-12)

Plaintiff/Appellee further alleged that on one occasion while in the ICU, Defendant/Appellant's staff was required to assist her ambulating to and from the bathroom but allowed her to fall twice, thereby "departing from the standard of care in the community" – – specifically, by failing to properly supervise her care, failing to provide an adequate number of nurses, failing to properly train nurses how to properly handle "patients such as plaintiff" and failure to exercise proper care to prevent injury. (Exhibit B, ¶¶ 8, 10-12 & 15)

The trial Court ruled that Plaintiff/Appellee's Complaint sounded in medical malpractice and dismissed Plaintiff/Appellee's claim for failure to comply with the medical malpractice notice and affidavit requirements pursuant to statute within the statute of limitations period. (Exhibit C) On review, the Court of Appeals found Plaintiff/Appellee's claims ambiguous, reversed the trial Court, and remanded the case for discovery.

If the Court of Appeals, after the benefit of extensive briefing and oral argument, is confused and/or unclear about what Plaintiff/Appellee's Complaint alleges, the Complaint necessarily fails to comply with MCR 2.111(B)(1). Moreover, the remedy is not to order discovery to figure out Plaintiff/Appellee's claims, as to do so is "clearly erroneous and will cause material injustice" to Defendant/Appellant as Defendant/Appellant would not know what it is called to defend. MCR 7.305(B)(5)(a).

Therefore, pursuant to MCR 7.305(B)(3) and MCR 7.305(B)(5)(a), this Honorable Court has jurisdiction in the case at bar as this case involves legal principles of major significance, and the Court of Appeals decision is clearly erroneous and will cause material injustice. For the

reasons stated herein above, Defendant/Appellant seeks leave to appeal the Court of Appeals' reversal and remand in favor of Plaintiff/Appellee.

STATEMENT OF STANDARD OF REVIEW

"In determining whether the nature of a claim is ordinary negligence or medical malpractice, as well as whether such claim is barred because of the statute of limitations, a court does so under MCR 2.116(C)(7). We review such claims de novo." *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411, 419; 684 NW2d 864 (2004), citing *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001). Under MCR 2.116(C)(7), the Court considers all documentary evidence submitted by the parties and accepts the contents of the complaint as true, unless contradicted by affidavits or other evidence. *Byrant, supra*. However, in the case at bar, Defendant/Appellant relied solely on Plaintiff/Appellee's Complaint, thereby limiting review to Plaintiff/Appellee's Complaint.

STATEMENT OF QUESTIONS PRESENTED

I. **WHETHER THE COURT OF APPEALS ERRED BY HOLDING THAT GRANTING DEFENDANT/APPELLANT'S MOTION FOR DISPOSITION WAS IMPROPER BECAUSE THE COURT OF APPEALS COULD NOT DETERMINE, BASED UPON READING PLAINTIFF/APPELLEE'S COMPLAINT, WHETHER THE COMPLAINT SOUNDED IN ORDINARY NEGLIGENCE OR MEDICAL MALPRACTICE?**

Plaintiff/Appellee Answers "NO"
Defendant/Appellant Answers "YES"
Trial Court Answers "YES"
Court of Appeals Answers "NO"

II. **WHETHER THE COURT OF APPEALS ERRED BY FAILING TO HOLD THAT PLAINTIFF/APPELLEE'S CLAIM OF "FAILURE TO ENSURE SAFETY" WAS A CLAIM OF STRICT LIABILITY AND, THEREFORE, UNENFORCEABLE?**

Plaintiff/Appellee Answers "NO"
Defendant/Appellant Answers "YES"
Trial Court Answers "YES"
Court of Appeals Answers "NO"

III. **WHETHER THE COURT OF APPEALS ERRED BY HOLDING THAT PLAINTIFF/APPELLEE'S COMPLAINT ALLEGED FAILURE TO TAKE CORRECTIVE STEPS AND THAT SAID ALLEGATION "POSSIBLY" SOUNDED IN ORDINARY NEGLIGENCE?**

Plaintiff/Appellee Answers "NO"
Defendant/Appellant Answers "YES"
Trial Court Answers "YES"
Court of Appeals Answers "NO"

IV. **WHETHER THE COURT OF APPEALS CORRECTLY HELD THAT PLAINTIFF/APPELLEE'S COMPLAINT FAILED TO ALLEGE THE DOCTRINE OF RES IPSA LOQUITUR AND, THUS, SAME WAS NOT PRESERVED FOR APPEAL?**

Plaintiff/Appellee Answers "NO"
Defendant/Appellant Answers "YES"
Trial Court Answers "YES"
Court of Appeals Answers "YES"

STATEMENT OF FACTS

SUBSTANTIVE FACTS:

On February 11, 2011, Plaintiff/Appellee, Audrey Trowell, was admitted to Providence Hospital as a result of an aneurysm that caused her to suffer a stroke; the stroke precipitated cardiac arrest. Therefore, Plaintiff/Appellee was admitted into the intensive care unit (ICU). (Exhibit B, ¶¶ 5-6).

During her admission in the ICU, Plaintiff/Appellee required hospital nursing and/or nursing aide staff to assist her ambulating to the lavatory. (Exhibit B, ¶ 8) Someone told Plaintiff/Appellee she needed two nurses to assist her.[2] Several times she was assisted by one nurse and on one of these occasions, that assistance was provided by "Dana" who allegedly dropped Plaintiff/Appellee twice. (Exhibit B, ¶¶ 10-12) Plaintiff/Appellee alleges a brain bleed as a result. (Exhibit B, ¶ 14)

PROCEDURAL FACTS:

Plaintiff/Appellee filed a Complaint in the Wayne County Circuit Court on February 11, 2014, three years after her admission to Defendant/Appellant hospital. On March 5, 2014 Defendant/Appellant filed a Motion for Change of Venue to have the matter transferred to the Oakland County Circuit Court and on March 26, 2014 the Wayne County Circuit Court entered a stipulated Order transferring the case to the Oakland County Circuit Court. (Exhibit D)

Thereafter, Defendant/Appellant filed a Motion for Summary Disposition pursuant to MCR 2.116(C)(7) and (8) on January 9, 2015. (Exhibit E) On April 8, 2015, the trial Court heard oral argument and entered an Order granting Defendant/Appellant's Motion for Summary Disposition. (Exhibit C)

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[2] Plaintiff/Appellee's Complaint does not specify whether the person who told her this was a physician, a nurse, a family member, a friend, a ward clerk or even if the person was affiliated with Defendant/Appellant hospital at all. Therefore, it would be purely speculative to assume the identity, medical knowledge, or lack thereof, of the person who made this statement.

Thereafter, Plaintiff/Appellee filed a Motion for Reconsideration and to Amend Complaint. (Exhibit F) On May 4, 2015, the trial Court entered two orders; the first denying Plaintiff/Appellee's Motion for Reconsideration and the second, denying Plaintiff/Appellee's Motion to Amend Complaint for failure to present a proposed Amended Complaint. (Exhibits G and H) Plaintiff/Appellee re-filed her Motion to Amend Complaint with a proposed Amended Complaint; however, on May 26, 2015, the trial Court again denied Plaintiff/Appellee's Motion. (Exhibits I and J) Plaintiff/Appellee's Claim of Appeal followed, with the Court of Appeals rendering an Opinion on August 16, 2016 reversing the trial Court's Order granting Defendant/Appellant's Motion for Summary Disposition and remanding the case for further proceedings.

ARGUMENT I

THE COURT OF APPEALS ERRED BY HOLDING THAT THE TRIAL COURT IMPROPERLY GRANTED DEFENDANT/APPELLANT'S MOTION FOR SUMMARY DISPOSITION SINCE THE COURT OF APPEALS COULD NOT DETERMINE, BASED UPON READING PLAINTIFF/APPELLEE'S COMPLAINT, WHETHER THE COMPLAINT SOUNDED IN ORDINARY NEGLIGENCE OR MEDICAL MALPRACTICE

In order to determine whether a claim sounds in medical malpractice versus ordinary negligence, the Court must engage in a two-step analysis, as a medical malpractice claim requires (1) that the alleged negligent action was taken within the course of a professional relationship, and (2) raises questions involving medical judgment. Conversely, claims of ordinary negligence raise issues within the common knowledge and experience of a layperson. *Bryant v Oakpointe Villa Nursing Ctr Inc,* 471 Mich 411, 422; 684 NW2d 864 (2004) citing, *Dorris v Detroit Osteopathic Hosp Corp,* 460 Mich 26, 45-46; 594 NW2d 455 (1999).

The parties do not dispute that a professional relationship existed at all times relevant hereto.

As it pertains to the second prong of the analysis, the *Bryant* Court explained that injuries resulting from a patient being dropped "may or may not implicate professional judgment. The court must examine the particular factual setting of the plaintiff's claim in order to determine whether the circumstances – for example, the medical condition of the plaintiff or the sophistication required to safely effect the move – implicate medical judgment." *Bryant,* 471 Mich at 421, citing *Dorris,* 460 Mich at 26.

The Court of Appeals indicated in its holding that since the Court could not discern whether Plaintiff/Appellee's Complaint was one of ordinary negligence or medical malpractice, based upon the plain language of Plaintiff/Appellee's Complaint, Plaintiff/Appellee should be allowed to conduct discovery in order to develop her theory. Thus, the Court of Appeals

reasoned that since it could not tell what Plaintiff/Appellee alleged, the trial Court's dismissal of Plaintiff/Appellee's Complaint based upon the trial Court's determination that the Complaint sounded in medical malpractice was reversible error.

The Court of Appeals' reversal and remand on this basis is incongruent with MCR 2.111(B)(1) as, according to the Court of Appeals, the Complaint did not reasonably inform Defendant/Appellant of the nature of the claim it was called to defend. MCR 2.111(B)(1).

A. THE COURT OF APPEALS' REASONING THAT SINCE IT FOUND PLAINTIFF/APPELLEE'S COMPLAINT TOO VAGUE AND AMBIGUOUS TO DETERMINE WHETHER IT WAS ONE OF ORDINARY NEGLIGENCE OR MEDICAL MALPRACTICE, PLAINTIFF/APPELLEE MUST BE ALLOWED TO CONDUCT DISCOVERY IN ORDER TO DEVELOP THE THEORY UNDER WHICH SHE INTENDS TO SUE DEFENDANT/APPELLANT, CONFLICTS WITH THE MICHIGAN COURT RULES

The Court of Appeals' Opinion completely disregards MCR 2.111(B)(1) and holds that where a Complaint is vague and unclear to the extent that the Court cannot determine whether the Complaint sounds in ordinary negligence versus medical malpractice, even after the Plaintiff/Appellee has been given the opportunity to amend her Complaint, the remedy is to make the Defendant/Appellant defend the claim, not knowing what it is defending against until the Plaintiff/Appellee decides to let the Defendant/Appellant and the Court know. This is absurd to say the least.

An ordinary negligence case is very different from a medical malpractice action; one is a Siamese cat and the other, a tiger. Just as one would handle a Siamese cat differently than a tiger, so too would a defendant defend an ordinary negligence claim differently than a medical malpractice claim.

Generally, when a Complaint is vague and ambiguous, the opposing party files a motion seeking a more definite statement. If the Court agrees, the Court gives the plaintiff an

opportunity to correct the defect by allowing the plaintiff to file an amended complaint. Failure to adequately correct the defect results in dismissal of the action. *Lyons v Brodsky*, 137 Mich App 304; 357 NW2d 679 (1984).

While Defendant/Appellant did not seek clarification and/or a more definite statement as it is Defendant/Appellant's opinion the Complaint herein clearly sounds in medical malpractice, the Court of Appeals has made the quality of Plaintiff/Appellee's Complaint an issue. Even assuming, arguendo, that Defendant/Appellant were to agree with the Court of Appeals' assessment of the quality of the Complaint, Plaintiff/Appellee was given an opportunity to amend her Complaint and rectify the defect; however, as the Court of Appeals noted, "plaintiff essentially repeated most of the allegations found in the original complaint. Paragraph 15 of the proposed amended complaint, . . . now simply asserted negligence on the part of the hospital for departing from the standard of care by failing to ensure plaintiff's safety while in the hospital. . . ." *Trowell* ____ Mich App ____ at *10. (Exhibit A)

In *Lyons v Brodsky*, 137 Mich App 304; 357 NW2d 679 (1984), the Court of Appeals held that where the complaint was vague and did not inform the defendant of the nature of the claim against which he was called to defend and the plaintiff, after being given the opportunity to remove the defect, did as Plaintiff/Appellee herein and essentially repeated the allegations previously plead, same "was the effective equivalent of declining the opportunity. . ." and dismissal of the complaint was appropriate. *Id.* at 310.

While the case at bar is not before the Court on a motion for more definite statement, the analogy is the same. The Court of Appeals found the Complaint too ambiguous to determine the nature of the claim; this remained true despite the trial Court granting Plaintiff/Appellee the opportunity to amend her Complaint. Despite the Court of Appeals' finding regarding the

quality of the Complaint and in direct conflict with *Lyons*, this Court of Appeals declined to dismiss Plaintiff/Appellee's case and instead provided her with yet another opportunity to "cure the vagueness" irrespective of the injustice to Defendant/Appellant. *Id.*

B. MEDICAL JUDGMENT IS NECESSARY TO ASSESS THE FALL RISK OF A PATIENT IN THE ICU FOR TREATMENT FOLLOWING ANEURYSM, STROKE AND CARDIAC ARREST, AS IS DETERMINING THE NUMBER OF NURSES OR NURSES' AIDES NEEDED AVAILABLE TO ASSIST WITH AMBULATION AND/OR PROPERLY CARE FOR PATIENTS

As explained in *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411; 684 NW2d 894 (2004), "the court must examine the particular factual setting of the plaintiff's claim in order to determine whether the circumstances – – for example, the medical condition of the plaintiff or the sophistication required to safely effect the moving – – implicate medical judgment as explained in *Dorris*." *Id.* at 421, relying on *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26; 594 NW2d 455 (1999)

In the case at bar, Plaintiff/Appellee has alleged that she required admission and care in Defendant/Appellant's ICU due to experiencing an aneurysm which lead to a stroke which caused cardiac arrest. (Exhibit B, ¶¶ 5-6). Taber's Cyclopedic Medical Dictionary (22nd ed.) defines these medical conditions:[3]

> aneurysm–Localized abnormal dilatation of a blood vessel, usually an artery, due to congenital defect or weakness of the wall of the vessel. As aneurysms dilate, they become more and more vulnerable to rupture. *Id.* at 128
>
> stroke–A sudden loss of neurological function, caused by vascular injury (loss of blood flow) to an area of the brain. Stroke is both common and deadly: about 700,000 strokes occur in the U.S. each year. Stroke is the third leading cause of death in the U.S. *Id.* at 2226

[3] The Court in *Byrant, supra* relied upon and quoted Tabers Cyclopedic Medical Dictionary to define various medical terms. 471 Mich at 415

arrest, cardiac–Sudden cessation of functional circulation.
Id. at 185

These are certainly not "uncomplicated or straightforward medical conditions" as suggested by the Court of Appeals in an attempt to distinguish this case from *Bryant, supra,* and *Sturgis Bank & Trust Co v Hillsdale Community Health Ctr*, 268 Mich App 484; 708 NW2d 453 (2005). *Trowell, ____ Mich App ____ at *27.* (Exhibit A) On the contrary, Defendant/Appellant would ask the Court to take judicial notice that people suffering these conditions and requiring the care provided in a hospital's intensive care unit (ICU) do not have "uncomplicated or straightforward medical conditions."

Assessing the Plaintiff/Appelle's fall risk, given her diagnoses, certainly "implicate[s] medical judgment." *Bryant,* 471 Mich at 421. Likewise, making staffing decisions relative to providing an "adequate number of nurses to assist Plaintiff while in Defendant's hospital," implicates medical judgment. *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 510; 668 NW2d 402 (2003).

Just as the ability to assess a patient's fall risk and determine the manner and technique appropriate for assisting a patient with ambulation involves medical judgment, so does determining how many nurses and/or nurse's aides are necessary on the unit to properly care for the patients on that unit. *Dorris*, 460 Mich at 47.

The average lay person does not possess the knowledge to assess the condition of the patients in the ICU and/or evaluate data regarding the condition and requirements of the average ICU patient and then determine the number of nurses and/or nurses' aides needed to properly staff the unit. Medical judgment is necessarily involved and required.

C. THE COURT OF APPEALS ERRONEOUSLY CONCLUDED PLAINTIFF/APPELLEE'S ALLEGATIONS OF FAILURE TO SUPERVISE AND FAILURE TO TRAIN SOUND IN ORDINARY NEGLIGENCE

Plaintiff/Appellee's Complaint alleges, in part:

> 15. Defendant hospital was negligent in one or more of the following particulars, departing from the standard of care in the community: . . .
>
> b. Failure to properly supervise the care of Plaintiff while in Defendant's hospital; . . .
>
> d. Failure to properly train "Dana" and other nurses in how to properly handle patients such as Plaintiff;
>
> e. Failure to exercise proper care and to prevent Plaintiff from being injured while in Defendant's hospital. (Exhibit A)

In *Dorris,* this Court citing *Bronson v Sisters of Mercy Health Corp.*, 175 Mich App 647, 652-653; 438 NW2d 276 (1989), noted that "[t]he providing of professional medical care and treatment by a hospital includes supervision of staff physicians. . ." The same is true for nurses and nurse's aides – – Defendant/Appellant hospital had to utilize medical judgment in its supervision of the nurses and nurse's aides caring for and assisting Plaintiff/Appellee's ambulation. *Dorris* 460 Mich at 26. See also *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 510-511; 668 NW2d 402 (2003).

Unlike the case at bar, the cases upon which Plaintiff/Appellee relies, *Fogel v Sinai Hospital of Detroit,* 2 Mich App 99; 138 NW2d 503 (1965) and *Gold v Sinai Hospital of Detroit, Inc,* 5 Mich App 368; 146 NW2d 723 (1966), do not involve plaintiffs who allege serious health issues thereby requiring the defendant to take various factors into consideration in order to assess the patient's fall risk. Instead, plaintiff in *Fogel* warned the person assisting her that she needed a two-person assist and plaintiff Gold warned her assistant that she would not be able to make it to the bathroom. The Courts held that both these claims fell within the realm of ordinary

negligence due to the patients' warning prior to the fall. See *Wilson v Stilwill,* 411 Mich 587, 611; 309 NW2d 898 (1991).

Additionally, Plaintiff/Appellee relies on *Sheridan v West Bloomfield Nursing & Convalescent Ctr, Inc,* which is also distinguishable from the case at bar. *Sheridan v West Bloomfield Nursing & Convalescent Ctr, Inc*, unpublished opinion per curiam of the Court of Appeals, issued March 6, 2007 (Docket No. 272205). (Exhibit K) Like *Fogel* and *Gold,* plaintiff Sheridan did not rely on her health condition as the basis for her claim, nor did she challenge the method used. Instead, Ms. Sheridan merely alleged the defendant was negligent because she failed to maintain her grip. *Id.*

Further, Plaintiff/Appellee relies on *McIver v St John Macomb Oakland Hosp,* which, as well, is distinguishable from the within case. (Exhibit L) *McIver* alleged she was placed into an unstable chair on a wet floor and left alone to sit and get up unassisted. *McIver v St John Macomb Hosp*, unpublished opinion per curiam of the Court of Appeals issued October 2, 2012 (Docket No. 303090) (Exhibit L, *McIver,* p. 4). Plaintiff McIver's claim is simply that it is unreasonable to sit a patient in an unstable chair on a wet floor and abandon the patient. *McIver* does not allege defendant's action was unreasonable because of plaintiff's condition, but rather she alleges the act itself was unreasonable.

Plaintiff/Appellee refers to the condition of her health. Specifically, Plaintiff/Appellee alleges a failure to train staff "how to handle patients such as Plaintiff." That is, patients in Plaintiff's condition – – patients like Plaintiff/Appellee who are in the ICU, patients who have suffered aneurysm, stroke and cardiac arrest.

In the absence of expert testimony, the jury would have to speculate about the type and level of training necessary to "properly handle patients such as Plaintiff." In other words, medical judgment is required to determine what training is needed.

Same is true relative to the allegation that Defendant/Appellant failed to "exercise proper care to prevent Plaintiff from being injured while in Defendant's hospital." Without the benefit of expert testimony, the jury would have to improperly speculate about what "proper care" looks like. Just as the Court of Appeals improperly engaged in pure speculation and went well beyond the allegations contained in Plaintiff/Appellee's Complaint in an effort to create a scenario wherein medical judgment and expert testimony might not be required. In fact, the Court of Appeals' speculation went well beyond reasonable inferences based on the Complaint and bordered on the absurd and ridiculous. For example, suggesting that Dana may have been on her cell phone while assisting Plaintiff/Appellee or that Dana may have been extremely petite (90 pounds) and Plaintiff/Appellee morbidly obese (500 pounds). *Trowell*, ____ Mich App ____ at *11 and *12. (Exhibit B) There are absolutely no allegations in Plaintiff/Appellee's Complaint to support such speculation and conjecture.

Therefore, given the factual setting in this case, medical judgment is required to determine "proper care."

ARGUMENT II

THE COURT OF APPEALS INCORRECTLY FAILED TO HOLD THAT PLAINTIFF/APPELLEE'S "FAILURE TO ENSURE SAFETY" ALLEGATION SOUNDED IN STRICT LIABLITY

Paragraph 15a of Plaintiff/Appellee's Complaint alleges a "failure to ensure the safety of Plaintiff while in Defendant's hospital." (Exhibit B) The Court of Appeals did not address this claim, but by virtue of its reversal and remand held that this allegation sounds in medical malpractice as well.

Contrary to the Court of Appeals' holding, the *Byrant* Court held that failure to ensure safety or "assure . . . an accident-free environment . . . is an assertion of strict liability that is not cognizable in either ordinary negligence or medical malpractice." *Byrant*, 471 Mich at 425-426.

Thus, the Court of Appeals erred by reversing and remanding this claim to the trial Court.

ARGUMENT III

PLAINTIFF/APPELLEE DID NOT ALLEGE FAILURE TO TAKE CORRECTIVE STEPS IN HER COMPLAINT, AND THEREFORE, THE COURT OF APPEALS ERRED BY HOLDING THAT SAID NONEXISTING CLAIM SOUNDED IN ORDINARY NEGLIGENCE

Paragraph 12 of Plaintiff/Appellee's Complaint reads:

> Dana attempted to assist Plaintiff again after dropping her, but instead she dropped Plaintiff a second time.

(Exhibit B)

Plaintiff/Appellee does not allege that "Dana" employed the exact same method, or did nothing differently. Instead, Plaintiff/Appellee merely alleges "Dana" dropped her twice. Plaintiff/Appellee is silent regarding the manner in which the second attempt was made. Therefore, if one is to assume anything, it is reasonable to assume Plaintiff/Appellee is silent on this issue because the facts are not helpful to her claim.

Moreover, Plaintiff/Appellee does not even allege "Dana" had a duty to do anything differently or to take corrective measures. Plaintiff/Appellee wants this Court to broaden the allegations in her Complaint so that it now includes allegations not contained therein, and then speculate and assume that "Dana" did not assess the situation or did nothing differently when assisting Plaintiff/Appellee ambulating prior to the alleged second fall. Said speculation and assumptions are improper.

However, should this Court interpret Paragraph 12 as sufficiently pleading failure to take corrective measures, the Court of Appeals nonetheless incorrectly held that the claim sounds in ordinary negligence. Specifically, the Court of Appeals again refers to and relies on its belief that Plaintiff/Appellee's Complaint is too vague to understand and/or determine whether medical knowledge is implicated and/or may be necessary to resolve the issue. Under the circumstances presented herein, if Plaintiff/Appellee has failed to plead in a such manner to inform the Court of

Appeals of the nature of her claim, the remedy is not reversal and remand to conduct discovery so that the Court and the parties can figure out what Plaintiff/Appellee has plead; the correct remedy is dismissal. *Lyons*, 137 Mich App at 310.

ARGUMENT IV

THE COURT OF APPEALS CORRECTLY CONCLUDED THAT PLAINTIFF/APPELLEE FAILED TO PLEAD AND THEREFORE, FAILED TO PRESERVE RES IPSA LOQUITUR FOR APPELLATE REVIEW

As the Court of Appeals recognized in footnote 11, Plaintiff/Appellee did not plead res ipsa loquitur in her Complaint, therefore, the issue was not preserved for appellate review by the Court of Appeals. Likewise, res ipsa loquitur was not preserved for review by this Honorable Court. *Trowell v Providence Hosp and Med Ctrs,* ___ *Mich App* ____ ; ____ *NW3d* ____ *(2016) (Docket No. 327525), p. *32.* (Exhibit A)

CONCLUSION

The Court of Appeals' rulings were improper as it relates to its findings that: 1) Plaintiff/Appellee's negligence claim sounded in ordinary negligence instead of medical malpractice; 2) Plaintiff/Appellee's failure to ensure safety allegation sounded in ordinary negligence instead of strict liability; and 3) Plaintiff/Appellee's Complaint contained an allegation of failure to take corrective steps and that same sounded in ordinary negligence.

However, the Court of Appeals correctly precluded Plaintiff/Appellee from arguing res ipsa loquitur, as said allegation was not preserved for appeal.

STATEMENT OF RELIEF SOUGHT

Defendant/Appellant Providence Hospital and Medical Centers, Inc. respectfully requests that this Honorable Court reverse the Court of Appeals' holding that Plaintiff/Appellee's Complaint sounds in ordinary negligence and affirm the trial Court.

STATEMENT IN SUPPORT OF REQUEST FOR ORAL ARGUMENT

Oral argument is essential as the Court of Appeals has proffered its Opinion as binding precedent; an Opinion based on conjecture and not on the facts as presented in Plaintiff/Appellee's Complaint.

Moreover, this Opinion does nothing to clarify the distinction between ordinary negligence and medical malpractice, but rather, blurs it.

Finally, this Opinion essentially renders two Michigan Court Rules null and void, MCR 2.111(B)(1) as previously discussed, and MCR 2.116(C)(8), as it all but eliminates motions for summary disposition based upon and limited to the four corners of a complaint.

Respectfully submitted,

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Dated: September 23, 2016

STATE OF MICHIGAN

IN THE SUPREME COURT OF MICHIGAN

LIST OF EXHIBITS

EXHIBIT A

STATE OF MICHIGAN

COURT OF APPEALS

AUDREY TROWELL,

Plaintiff-Appellant,

v

PROVIDENCE HOSPITAL AND MEDICAL CENTERS, INC.,

Defendant-Appellee.

FOR PUBLICATION
August 16, 2016
9:05 a.m.

No. 327525
Oakland Circuit Court
LC No. 2014-141798-NO

Before: MURPHY, P.J., and STEPHENS and BOONSTRA, JJ.

MURPHY, P.J.

Plaintiff Audrey Trowell appeals as of right the trial court's order granting summary disposition in favor of defendant Providence Hospital and Medical Centers, Inc. (the hospital), in this dispute that, at this juncture, concerns whether plaintiff's complaint sounded in medical malpractice or ordinary negligence. The substance of the case regards an incident in which a patient-care technician employed by the hospital allegedly "dropped" plaintiff twice while assisting and escorting her to the bathroom, resulting in various injuries. There is no dispute that plaintiff did not take the mandatory procedural steps associated with a medical malpractice action, such as serving a notice of intent, MCL 600.2912b, and procuring and filing an affidavit of merit, MCL 600.2912d. And the lawsuit was filed beyond the two-year statute of limitations generally applicable to medical malpractice actions, MCL 600.5838a(2); MCL 600.5805(1) and (6). Solely on the basis of the allegations in plaintiff's complaint, as there was no documentary evidence presented in regard to the hospital's motion for summary disposition, the trial court ruled that plaintiff's lawsuit sounded in medical malpractice and dismissed the action in its entirety. The trial court denied plaintiff's motions for reconsideration and to amend the complaint. Because the allegations in the complaint did not lend themselves to a definitive determination that the negligence claims in plaintiff's suit necessarily sounded in medical malpractice, we reverse and remand for further proceedings.

I. BACKGROUND

On February 11, 2014, plaintiff filed a single-count complaint against the hospital in the Wayne Circuit Court; however, pursuant to a stipulated order, venue was transferred to the Oakland Circuit Court. In the complaint, under a count titled "Medical Negligence," plaintiff

alleged that on February 11, 2011, she was admitted to the hospital after having suffered a stroke caused by an aneurysm. Plaintiff asserted that she subsequently went into cardiac arrest and that she was placed in the hospital's intensive care unit (ICU). Plaintiff alleged in the complaint that she had been advised that two nurses needed to assist her whenever she went to the bathroom, yet "on several occasions" the hospital only employed one nurse to assist plaintiff to the bathroom. She additionally contended that on one particular occasion an unassisted female nurse[1] was tasked with helping plaintiff in going to and using the bathroom and that she "dropped" plaintiff, causing her to hit her head on a wheelchair. According to the complaint, when the nurse's aide attempted to assist plaintiff after dropping her, the aide "dropped [p]laintiff a second time." Plaintiff alleged that as a result of the falls, she suffered a torn rotator cuff, requiring multiple surgeries and treatment that was ongoing, as well as "bleeding on the brain."

Plaintiff alleged that the hospital had a duty to ensure that she "received proper assistance while a patient, including assistance ambulating to and from the bathroom while she was in the ICU." The complaint further set forth the following allegations:

> 15. Defendant hospital was negligent in one or more of the following particulars, departing from the standard of care in the community:
>
> a. Failure to ensure the safety of Plaintiff while in Defendant's hospital;
>
> b. Failure to properly supervise the care of Plaintiff while in Defendant's hospital;
>
> c. Failure to provide an adequate number of nurses to assist Plaintiff while in Defendant's hospital;
>
> d. Failure to properly train [the nurse's aide] and other[s] . . . in how to properly handle patients such as Plaintiff;
>
> e. Failure to exercise proper care to prevent Plaintiff from being injured while in Defendant's hospital[.]

Plaintiff additionally alleged that the "hospital was negligent through its agents, employees, and staff in failing to ensure the safety of" plaintiff and that the negligence of the hospital "and its agents, employees and staff was the proximate [cause] of" plaintiff's alleged damages. In her prayer for relief, plaintiff sought a judgment awarding her economic damages for lost wages and earning capacity, noneconomic damages in the amount $2.5 million, and costs.

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[1] It was later revealed that this employee was a patient-care technician, essentially a nurse's aide, and not a nurse. We shall refer to her for the remainder of this opinion as the "nurse's aide" or simply the "aide."

The hospital filed an answer to the complaint and affirmative defenses, indicating, in part, that plaintiff's suit was time-barred and that she had failed to serve a notice of intent and file an affidavit of merit as required in medical malpractice actions. Subsequently, the hospital filed a motion for summary disposition pursuant to MCR 2.116(C)(7) and (8), arguing that plaintiff's complaint sounded in medical malpractice and not ordinary negligence, that the suit was barred by the two-year statute of limitations applicable to medical malpractice actions, that plaintiff failed to serve a notice of intent, so there was no tolling of the limitations period, and that plaintiff failed to file an affidavit of merit. The hospital maintained that plaintiff's suit sounded in medical malpractice, considering that a professional relationship had existed between plaintiff and the hospital and that the alleged acts of negligence raised questions of medical judgment that were not within the common knowledge and experience of laypersons. The latter proposition forms the heart of this appeal.

In response to the hospital's motion for summary disposition, plaintiff contended that the issues concerning the two-year statute of limitations, a notice of intent, and an affidavit of merit were all irrelevant, given that plaintiff's "claim was not filed as a medical malpractice action." Plaintiff argued that medical expertise was not necessary "in order for a jury to decide whether a[n] [aide] dropping someone is negligence" and that a juror would be able to discern, absent medical testimony, that plaintiff had not been handled properly. Plaintiff further maintained that her suit and the alleged breach of duty did not entail the aide's administration of any medical care or treatment or the exercise of medical judgment, that the nurse's aide was simply assisting plaintiff in using the bathroom, that being dropped by an aide who was unassisted constituted clear negligence, and that the issue of the hospital's alleged failure to prevent plaintiff's injury could be answered without any specialized knowledge. Finally, plaintiff argued that summary disposition was premature because discovery had not yet been completed.[2]

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[2] Pursuant to a second amended scheduling order, the discovery deadline was April 22, 2015, which was two weeks after the trial court granted the hospital's motion for summary disposition on April 8, 2015. The record reflects that the parties had served and answered some interrogatories and document-production requests. In February 2015, plaintiff served a deposition notice and subpoena duces tecum on the hospital designated for the nurse's aide. At this point, plaintiff did not know the aide's full name or address. The nurse's aide no longer worked for the hospital, and per order dated March 4, 2015, the trial court directed the hospital's attorney to provide plaintiff's counsel with the last known address of the nurse's aide. The address was provided, and plaintiff again served a deposition notice and subpoena duces tecum, with the deposition being scheduled for March 31, 2015. The hospital then filed a motion to quash the subpoena, challenging some of the document requests identified in the subpoena as having to be produced by the aide at her deposition. The trial court granted the motion on March 27, 2015, finding that the subpoena was "overbroad." Plaintiff then renewed her efforts by serving yet another deposition notice and subpoena duces tecum, setting a deposition date of April 9, 2015 – the day after summary disposition was entered in favor of the hospital. The hospital had also filed a motion to quash the most recent subpoena, which motion was never decided in light of the summary disposition ruling. In sum, a deposition of the nurse's aide was

After reviewing the factual and procedural history of the case and reciting the two-part test enunciated in *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411, 422; 684 NW2d 864 (2004),[3] which test is employed in determining whether a claim sounds in medical malpractice or ordinary negligence, the trial court ruled as follows at the hearing on the hospital's summary disposition motion:

> Here, there's no dispute that the professional relationship requirement is met. At issue is the second element. The [c]ourt finds that plaintiff's allegations sound in medical malpractice. Furthermore, allegations concerning staffing decisions and patient monitoring involve questions of professional medical management and not issues of ordinary negligence that can be judged by the common knowledge and experience of a jury. . . . Therefore, [the hospital's] motion for summary disposition is granted.

On April 8, 2015, an order was entered granting the hospital's motion for summary disposition for the reasons stated on the record. Plaintiff then filed a motion for reconsideration and to amend the complaint. On May 4, 2015, the trial court entered two orders. One order denied plaintiff's motion for reconsideration, with the trial court concluding that plaintiff had failed to demonstrate palpable error and was merely presenting the same issues that had been previously ruled on by the court. In the second order, the trial court indicated that plaintiff had failed to attach to her motion a proposed amended complaint, depriving the court of the opportunity to engage in meaningful review of her request for leave to file an amended complaint. The trial court directed plaintiff to refile her motion to amend with an attached proposed amended complaint. Plaintiff did so, and her proposed amended complaint again contained a single count, but it was retitled "Negligence." Plaintiff essentially repeated most of the allegations found in the original complaint. Paragraph 15 of the proposed amended complaint, which paragraph in the original complaint we quoted earlier, now simply asserted negligence on the part of the hospital for departing from the standard of care by failing to ensure plaintiff's safety while in the hospital, thereby retaining only subparagraph (a) from the original

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never conducted. At the hearing on summary disposition, plaintiff's counsel acknowledged that she had pled multiple possible theories of negligence or liability, and she expressed that she had not yet settled on any particular theory where discovery was ongoing and the aide was scheduled to be deposed. Plaintiff's counsel explained, "They don't know if it was because two nurses were supposed to have assisted, whether the [aide] in question just wasn't able to physically assist her, [or] what the circumstances were that caused her to drop [plaintiff]."

[3] The *Bryant* Court explained that "a court must ask two fundamental questions in determining whether a claim sounds in ordinary negligence or medical malpractice: (1) whether the claim pertains to an action that occurred within the course of a professional relationship; and (2) whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience." *Bryant*, 471 Mich at 422. There is no dispute in this case that plaintiff's suit concerned an action that took place within the course of a professional relationship.

paragraph 15.[4] Plaintiff did repeat the earlier allegations that the "hospital was negligent through its agents, employees, and staff in failing to ensure the safety of" plaintiff and that the negligence of the hospital "and its agents, employees and staff was the proximate [cause] of" plaintiff's alleged damages.

On May 26, 2015, the trial court entered an order denying plaintiff's renewed motion to amend her complaint, ruling that the motion was "essentially a motion for reconsideration," which had already been denied, that the proposed amended complaint still sounded in medical malpractice, and that, therefore, any amendment would be futile. Plaintiff appeals as of right.

II. ANALYSIS

A. OVERVIEW OF APPELLATE ARGUMENTS

On appeal, plaintiff argues that her claims of failure to ensure safety, failure to exercise proper care, failure to train, failure to supervise, and failure to provide adequate staff all sounded in ordinary negligence and not medical malpractice. She further maintains that Michigan caselaw involving "dropped" or "fallen" patients in medical settings have all been held to sound in ordinary negligence. Plaintiff alternatively contends that even assuming some of her claims sounded in medical malpractice, there still remained viable claims of ordinary negligence. She also asserts that her claims implicated the doctrine of res ipsa loquitor. Finally, plaintiff argues that the trial court erred in denying her motion to amend the complaint.

The hospital argues that the trial court did not err in granting its motion for summary disposition and in denying plaintiff's motions for reconsideration and to amend the complaint. The hospital contends that medical knowledge and expertise were necessary to assess plaintiff's fall risk, that plaintiff did not allege a failure to take corrective steps, which was recognized in *Bryant* as a claim sounding in ordinary negligence, that staffing decisions require the exercise of medical judgment, that failure to ensure safety is not a viable, recognizable claim, and that the requirements for the application of res ipsa loquitor were not met. The hospital further maintains that plaintiff's proposed amended complaint also sounded in medical malpractice; therefore, the amendment would have been futile. Finally, the hospital argues that, given the inescapable conclusion that plaintiff's suit sounded entirely in medical malpractice, the suit was not properly commenced in accord with mandatory procedural steps and was also time-barred.

B. STANDARD OF REVIEW AND SUMMARY DISPOSITION PRINCIPLES

A trial court's decision on a motion for summary disposition is reviewed de novo on appeal. *Elba Twp v Gratiot Co Drain Comm'r*, 493 Mich 265, 277; 831 NW2d 204 (2013).

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[4] It appears that plaintiff deleted subparagraphs (b) through (e) on the basis that the hospital's motion for summary disposition, for whatever reason, omitted subparagraph (a) when referencing the complaint. However, the trial court's ruling granting summary disposition clearly encompassed all of plaintiff's claims.

"We review a trial court's ruling on a motion for reconsideration for an abuse of discretion." *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009). This Court likewise reviews for an abuse of discretion a trial court's ruling on a motion to amend a complaint. *Diem v Sallie Mae Home Loans, Inc*, 307 Mich App 204, 215-216; 859 NW2d 238 (2014). In *Bryant*, 471 Mich at 419, our Supreme Court observed:

> In determining whether the nature of a claim is ordinary negligence or medical malpractice, as well as whether such claim is barred because of the statute of limitations, a court does so under MCR 2.116(C)(7). We review such claims de novo. In making a decision under MCR 2.116(C)(7), we consider all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict it. [Citations omitted.]

The hospital's motion for summary disposition cited both MCR 2.116(C)(7) and (8), and the hospital's argument focused solely on the allegations in the complaint; no documentary evidence was submitted by either party. The trial court did not identify the particular ground under MCR 2.116(C) that it relied upon in making its decision, but the court's ruling from the bench was couched in terms of plaintiff's "allegations." For purposes of MCR 2.116(C)(7), the hospital was permitted but not required to submit documentary evidence in support of its motion. MCR 2.116(G)(2) and (3); see *Whitmore v Charlevoix Co Rd Comm*, 490 Mich 964; 806 NW2d 307 (2011) (While a party may support a motion brought under MCR 2.116[C][7] with affidavits, depositions, admissions, or other documentary evidence, the movant is not required to do so, and the opposing party need not reply with supportive material.) In light of the proceedings below, our attention will be directed solely at the allegations in plaintiff's complaint, which we must accept as true.

C. *BRYANT* AND OTHER PERTINENT CASELAW

In *Bryant*, the Michigan Supreme Court addressed four distinct claims of negligence brought against a nursing facility that arose out of a death from positional asphyxiation while the decedent was in the facility's care. The Court was "required . . . to determine whether each claim sound[ed] in medical malpractice or ordinary negligence." *Bryant*, 471 Mich at 414. Pertinent here, the *Bryant* Court stated:

> A medical malpractice claim is distinguished by two defining characteristics. First, medical malpractice can occur only within the course of a professional relationship. Second, claims of medical malpractice necessarily raise questions involving medical judgment. Claims of ordinary negligence, by contrast, raise issues that are within the common knowledge and experience of the fact-finder. Therefore, a court must ask two fundamental questions in determining whether a claim sounds in ordinary negligence or medical malpractice: (1) whether the claim pertains to an action that occurred within the course of a professional relationship; and (2) whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience. If both these

questions are answered in the affirmative, the action is subject to the procedural and substantive requirements that govern medical malpractice actions.

* * *

After ascertaining that the professional relationship test is met, the next step is determining whether the claim raises questions of medical judgment requiring expert testimony or, on the other hand, whether it alleges facts within the realm of a jury's common knowledge and experience. If the reasonableness of the health care professionals' action can be evaluated by lay jurors, on the basis of their common knowledge and experience, it is ordinary negligence. If, on the other hand, the reasonableness of the action can be evaluated by a jury only after having been presented the standards of care pertaining to the medical issue before the jury explained by experts, a medical malpractice claim is involved. . . . .

Contributing to an understanding of what constitutes a "medical judgment" is *Adkins v Annapolis Hosp*, 116 Mich App 558[, 564]; 323 NW2d 482 (1982), in which the Court of Appeals held:

"Medical malpractice has been defined as the failure of a member of the medical profession, employed to treat a case professionally, to fulfill the duty to exercise that degree of skill, care and diligence exercised by members of the same profession, practicing in the same or similar locality, in light of the present state of medical science. . . . ." [*Bryant*, 471 Mich at 422-424 (citations, quotation marks, ellipsis, and alteration brackets omitted).[5]]

The *Bryant* Court cautioned that "[t]he fact that an employee of a licensed health care facility was engaging in medical care at the time the alleged negligence occurred means that the plaintiff's claim may *possibly* sound in medical malpractice; it does not mean that the plaintiff's claim *certainly* sounds in medical malpractice." *Id.* at 421.

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[5] The *Bryant* Court also alluded to a preliminary issue concerning whether an action is being commenced "against someone who, or an entity that, is capable of malpractice." *Bryant*, 471 Mich at 420. The hospital, as an entity, is plainly capable of malpractice. See *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 11; 651 NW2d 356 (2002) ("A hospital may be . . . directly liable for malpractice[.]"). And, to the extent that plaintiff's suit is based on the hospital's vicarious liability for the alleged negligence of the nurse's aide, see *id.* (a hospital can be held "vicariously liable for the negligence of its agents"), *Bryant* itself regarded, in part, claims associated with the conduct and training of certified nursing assistants, implicitly concluding that such employees are capable of malpractice, *Bryant*, 471 Mich at 420-421 and n 8, citing MCL 600.5838a. The parties did not address this issue below, nor do they on appeal, so we shall not explore the matter any further.

The physical movement or transfer of a patient by medical staff "may or may not implicate professional judgment." *Bryant*, 471 Mich at 421 n 9. "The court must examine the particular factual setting of the plaintiff's claim in order to determine whether the circumstances – for example, the medical condition of the plaintiff or the sophistication required to safely effect the move – implicate medical judgment . . . ." *Id.*[6] In *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 490-491; 668 NW2d 402 (2003), which opinion predated *Bryant,* the plaintiff sustained a laceration to her right leg when nurses attempted to move the plaintiff from a toilet to her wheelchair. This Court held that the "plaintiff's claim was of medical malpractice because an ordinary layman lacks knowledge regarding the appropriate methods and techniques for transferring patients." *Id.* at 510. In *Sturgis Bank & Trust Co v Hillsdale Community Health Ctr*, 268 Mich App 484, 497-498; 708 NW2d 453 (2005), a case involving an alleged closed-head injury resulting from a fall from a hospital bed, this Court, after reviewing *Bryant*, held:

> Here, plaintiff alleged in the complaint that defendant's nurses were negligent in failing to prevent Walling's fall, in permitting her to arise unassisted, in failing to protect her from falling, and in otherwise failing to exercise such measures when the nurses knew, or should have known, of Walling's risk of falling. The complaint also alleged that, at the time of the fall, Walling was lethargic, in pain, uncooperative, noncompliant, and had labored breathing. There was documentary evidence indicating that Walling was restless, somewhat disoriented, in pain, being medicated with morphine for pain, and instructed not to get out of bed.

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[6] In *Gold v Sinai Hosp of Detroit, Inc*, 5 Mich App 368, 369-370; 146 NW2d 723 (1966), this Court, relying on *Fogel v Sinai Hosp of Detroit*, 2 Mich App 99; 138 NW2d 503 (1965) (case involving patient who fell and broke her hip while walking with the assistance of a nurse's aide after patient warned that one aide alone would not be capable of adequately assisting her in walking), ruled:

> In the instant case, the patient warned the nurse who was assisting her onto an examination table that she was nauseated and dizzy and that she "would not be able to make it." With the nurse's assurances that she would brace the plaintiff from behind, plaintiff endeavored to move from a sitting to a prone position. The promised assistance did not materialize and plaintiff fell, sustaining injuries, for which she sought to recover damages. This appeal followed the directed verdict for defendant below.
>
> Neither *Fogel* nor the instant case present a malpractice question but rather a question of ordinary negligence. Defendant attempted to distinguish the two cases on the theory that *Fogel* involved a nonprofessional nurse's aide, whereas the instant case involves a professional nurse. This is a distinction without a difference.

> At the depositions of various nurses involved in Walling's treatment, plaintiff's counsel continually focused his questioning on risk assessment with respect to falling out of bed and the various factors taken into consideration when making an assessment, including the medications being prescribed to the patient and the patient's state of mind. It is clear from the deposition testimony that a nursing background and nursing experience are at least somewhat necessary to render a risk assessment and to make a determination regarding which safety or monitoring precautions to utilize when faced with a patient who is at risk of falling. While, at first glance, one might believe that medical judgment beyond the realm of common knowledge and experience is not necessary when considering Walling's troubled physical and mental state, the question becomes entangled in issues concerning Walling's medications, the nature and seriousness of the closed-head injury, the degree of disorientation, and the various methods at a nurse's disposal in confronting a situation where a patient is at risk of falling. The deposition testimony indicates that there are numerous ways in which to address the risk, including the use of bedrails, bed alarms, and restraints, all of which entail some degree of nursing or medical knowledge. Even in regard to bedrails, the evidence reflects that hospital bedrails are not quite as simple as bedrails one might find at home. In sum, we find that, although some matters within the ordinary negligence count might arguably be within the knowledge of a layperson, medical judgment beyond the realm of common knowledge and experience would ultimately serve a role in resolving the allegations contained in this complaint. Accordingly, we find that the trial court did not err in dismissing the ordinary negligence claim.

D. DISCUSSION – APPLICATION OF LAW TO THE FACTS

As explained above, we are confined to examining the allegations in plaintiff's complaint. One of the difficulties in this case is that the complaint is fairly vague and lacks elaboration in terms of describing and factually supporting the particular theories of negligence set forth in the complaint, ostensibly because plaintiff was short on information concerning details of the incident and intended to rely on discovery to elicit specifics. It is unclear from the record regarding the nature, clarity, and extent of any memories that plaintiff herself has of the incident given her condition while in the ICU. The gravamen of a lawsuit is determined by reading the complaint as a whole and by looking beyond the labels attached by a party. *Kuznar v Raksha Corp*, 272 Mich App 130, 134; 724 NW2d 493 (2006). In resolving whether claims alleged medical malpractice or ordinary negligence, "we disregard the label . . . applied to the[] claims." *Id.*[7] A complaint cannot avoid the application of procedural requirements associated

[7] For this reason, we give little consideration to the fact that plaintiff's complaint referred to "medical" negligence. Further, although the complaint alluded to the hospital departing from "the standard of care in the community," negligence actions in general entail an alleged breach of the standard of care, not just medical malpractice suits. See *Moning v Alfono*, 400 Mich 425, 437, 442-449; 254 NW2d 759 (1977).

with a medical malpractice action by couching the cause of action in terms of ordinary negligence. *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 43; 594 NW2d 455 (1999).

A fair reading of the complaint reveals that plaintiff is alleging that the hospital is directly liable for negligence relative to training, supervision, staffing, monitoring, and oversight, as well as vicariously liable for the aide's negligence and the negligence of other employees possibly involved in plaintiff's care if it had a bearing on causation. With respect to an ordinary negligence action in an employment setting, an employer is generally subject to direct liability for its negligence in hiring, training, and supervising employees. *Zsigo v Hurley Med Ctr*, 475 Mich 215, 227; 716 NW2d 220 (2006) (case involving sexual assault by hospital employee). An employer can also be held vicariously liable for the wrongful acts of its employees that are committed while performing some duty within the scope of their employment. *Rogers v J B Hunt Transp, Inc*, 466 Mich 645, 651; 649 NW2d 23 (2002). Similarly, in the context of medical malpractice actions and as mentioned earlier, "[a] hospital may be 1) directly liable for malpractice, through claims of negligence in supervision[,] . . . selection[,] and retention of medical staff, or 2) vicariously liable for the negligence of its agents." *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 11; 651 NW2d 356 (2002).

As best we can glean from plaintiff's complaint, the claims of direct and vicarious liability are ultimately predicated on a negligence theory pertaining to (1) the use of one nurse's aide to assist plaintiff and not two aides or nurses, and (2) the manner in which the nurse's aide physically handled plaintiff when providing assistance, regardless of the number of hospital personnel involved. Stated otherwise, plaintiff is alleging that the nurse's aide was negligent for attempting to assist plaintiff without help and/or for improperly handling plaintiff and that the hospital was negligent for training, supervision, staffing, monitoring, and oversight decisions tied to the number of aides or nurses needed, available, and employed to assist plaintiff and/or in regard to proper patient handling techniques when moving a patient. We must assess whether these liability claims sounded in medical malpractice or ordinary negligence.

1. ONE VERSUS TWO AIDES OR NURSES

With respect to the claim of negligence pertaining to the number of aides or nurses used to assist plaintiff in accessing the ICU bathroom, medical judgment, knowledge, and expertise could certainly play an integral role in determining whether one person or two persons should assist a patient in walking or moving.[8] A patient's physical and mental state or condition, as impacted by illness, surgery, anesthesia, medications, and the like, may very well dictate the number of hospital employees needed to safely escort or move the patient from one location to another and require testimony from medical experts.

[8] Although plaintiff's complaint alleges that "she [presumably, plaintiff] had been advised that two nurses needed to assist Plaintiff to the bathroom," it does not elaborate on who provided that advice or the circumstances under which it was provided. The development of an evidentiary record in that regard conceivably may impact the analysis of whether the use of only one aide constituted, allegedly, medical malpractice or, alternatively, ordinary negligence.

However, we can also envision a situation in which the determination regarding whether it was negligent to employ just one worker to assist a patient can be made by a jury on the basis of the jurors' common knowledge and experience. For example, if the weight differential between the nurse's aide at issue here and plaintiff was significant, or if the nurse's aide had some type of handicap or a recent injury bearing on her ability to provide assistance, a layperson, absent expert medical testimony, might be able to easily and properly evaluate the reasonableness of the decision not to seek a second aide or nurse to assist in moving or escorting plaintiff. By way of a somewhat extreme yet pertinent and plausible hypothetical, if an aide weighed 90 pounds soaking wet and a patient weighed 500 pounds, a layperson would be capable of assessing, on the basis of common knowledge and experience, whether it was negligent for the aide to attempt moving or handling the patient without help.

We recognize that in certain cases it may be necessary to consider matters that implicate medical judgment *in conjunction with matters that do not implicate medical judgment* relative to evaluating whether negligence occurred in moving or handling a patient, which would effectively make the case a medical malpractice action. See *Sturgis Bank & Trust*, 268 Mich App at 497-498.[9] But, in certain cases, factors not requiring or implicating medical judgment may be fully sufficient in and of themselves to properly assess the reasonableness of conduct, falling within the realm of common knowledge and experience. Absent documentary evidence and illumination from the complaint, we simply cannot ascertain whether the instant case is such a case or whether medical expertise and judgment must be contemplated relative to the question of the number of aides or nurses that should have been employed to safely assist plaintiff. The allegations in the complaint alone were inadequate to serve as a basis to summarily dismiss plaintiff's action, and plaintiff was not obligated to submit documentary evidence where the hospital chose not to do so in support of its motion for summary disposition. *Whitmore*, 490 Mich at 964.[10]

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[9] One of the features that distinguishes *Sturgis Bank & Trust* from the instant case is that here we only have the allegations in the complaint to guide our analysis, where in *Sturgis Bank & Trust* the panel extensively discussed the documentary evidence in resolving whether the suit sounded in medical malpractice or ordinary negligence. *Sturgis Bank & Trust*, 268 Mich App at 497-498.

[10] We do wish to make clear that simply because a patient's physical or mental condition may be relevant to assessing the level of assistance needed, it does not necessarily mean that medical judgment is implicated, as laypersons, relying on common knowledge or experience, may be able to grasp uncomplicated or straightforward medical conditions. See *Bryant*, 471 Mich at 421 n 9 ("The court must examine the particular factual setting of the plaintiff's claim in order to determine whether the circumstances – for example, the medical condition of the plaintiff or the sophistication required to safely effect the move – implicate medical judgment . . . ."). This proposition applies equally to our discussion below regarding patient-handling techniques.

2. ALLEGED NEGLIGENCE IN PHYSICALLY HANDLING PLAINTIFF IRRESPECTIVE OF THE NUMBER OF AIDES OR NURSES EMPLOYED

Comparable to our preceding discussion, medical judgment and experience may or may not be necessary to evaluate whether the nurse's aide was negligent as to the manner in which she physically assisted plaintiff, regardless of the allegation that the aide should have sought help from another aide or nurse. Medical judgment, knowledge, and expertise could certainly be pertinent in determining the proper technique to use when holding and escorting a patient. A patient's physical and mental state or condition, as impacted by illness, surgery, anesthesia, medications, and the like, may very well dictate how a patient should be physically handled when being moved. However, in any given case and on the basis of common knowledge and experience, lay jurors could evaluate whether negligence was involved in assisting a patient if the nature of the assistance was so plainly unreasonable that evidence of medical judgment and knowledge was simply rendered immaterial. For example, accepting as true, as we must do, the allegation that the nurse's aide dropped plaintiff, if evidence was developed showing that the aide dropped her because the aide decided to answer a cell phone call or because the aide held plaintiff with an extremely and ridiculously loose grip, a jury could likely evaluate the reasonableness of the aide's act without resort to medical judgment, utilizing common knowledge and experience. Again, we recognize that in certain cases it may be necessary to examine matters that implicate medical judgment in conjunction with matters that do not implicate medical judgment relative to evaluating whether negligence occurred in handling a patient. But we cannot determine solely from the allegations in plaintiff's complaint whether this case falls into that category, implicating medical judgment, or whether medical judgment is simply not relevant in assessing whether the nurse's aide acted reasonably.[11]

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[11] To the extent that the issue arises following remand, plaintiff's argument regarding the doctrine of res ipsa loquitur (the thing speaks for itself) is misplaced and lacks merit. We initially note that she did not allege the application of the doctrine in her complaint, nor was the doctrine argued in connection with the hospital's motion for summary disposition. Accordingly, the argument was unpreserved for purposes of appeal and need not be reviewed. *Booth Newspapers, Inc v Univ of Mich Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993). Nevertheless, we shall briefly address the issue. The doctrine of res ipsa loquitur, which, when applicable, creates an inference of negligence on the basis of circumstantial evidence, requires a showing that the incident was of a kind that ordinarily does not occur in the absence of negligence. *Woodard v Custer*, 473 Mich 1, 6-7; 702 NW2d 522 (2005). We cannot conclude that this case presents such a scenario. Regardless, while a medical malpractice case may proceed to a jury absent expert testimony if the requirements of the doctrine of res ipsa loquitur are satisfied, *id.* at 6, the case nevertheless remains a medical malpractice action subject to the applicable statute of limitations for medical malpractice suits, as well as to the "notice of intent" and "affidavit of merit" requirements. The doctrine does not convert or transform a medical malpractice action into an ordinary negligence suit.

3. THE SECOND "DROPPING"

Even if medical judgment was implicated with respect to the allegation that the nurse's aide dropped plaintiff the first time, the alleged subsequent or second "dropping" requires some additional thought. When medical personnel have knowledge of a particular hazard confronting a patient and no corrective action is taken to reduce the risk presented, a claim of failure to take steps or respond generally sounds in ordinary negligence. *Bryant*, 471 Mich at 430-431. The *Bryant* Court observed:

> Suppose, for example, that two CENAs [nursing assistants] employed by defendant discovered that a resident had slid underwater while taking a bath. Realizing that the resident might drown, the CENAs lift him above the water. They recognize that the resident's medical condition is such that he is likely to slide underwater again and, accordingly, they notify a supervising nurse of the problem. The nurse, then, does nothing at all to rectify the problem, and the resident drowns while taking a bath the next day.
>
> If a party alleges in a lawsuit that the nursing home was negligent in allowing the decedent to take a bath under conditions known to be hazardous, the [legal] standard would dictate that the claim sounds in ordinary negligence. No expert testimony is necessary to show that the defendant acted negligently by failing to take any corrective action after learning of the problem. A fact-finder relying only on common knowledge and experience can readily determine whether the defendant's response was sufficient. [*Id.* at 431.]

By analogy, and accepting the complaint's allegations as true, after plaintiff was dropped the first time and hit her head on a wheelchair, it is possible that lay jurors, on the basis of common knowledge and experience and absent consideration of medical judgment, could readily determine that it was unreasonable for the nurse's aide to simply and immediately continue her effort to get plaintiff to the bathroom without seeking help from other hospital personnel. Although we are not ruling out the possibility that medical judgment was implicated with regard to the second dropping, given the complete lack of documentary evidence, if the trial court eventually returns to the issue of whether plaintiff's action sounded in medical malpractice or ordinary negligence, the court must keep in mind that the first and second "droppings" may be distinguishable under *Bryant*.

III. CONCLUSION

We cannot conclude solely on the basis of the allegations in the complaint, which is all that can be considered given the procedural posture of the case, that plaintiff's claims sounded in medical malpractice. Accordingly, the trial court erred in summarily dismissing plaintiff's lawsuit. Further factual development is required to properly ascertain whether plaintiff's claims sounded in medical malpractice or ordinary negligence, and perhaps the suit presents a mix of

such claims. Testimony by the nurse's aide would appear to be a key factor in answering the question.[12]

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Having fully prevailed on appeal, plaintiff is awarded taxable costs pursuant to MCR 7.219.

/s/ William B. Murphy
/s/ Cynthia Diane Stephens
/s/ Mark T. Boonstra

[12] With respect to plaintiff's argument challenging the denial of her motion to amend the complaint, under MCR 2.118, leave to amend a pleading must be freely given when justice so demands, and a motion to amend should ordinarily be granted unless there exists undue delay, bad faith or a dilatory motive, repeated failures to cure deficiencies with prior amendments, undue and actual prejudice, or futility. *Weymers v Khera*, 454 Mich 639, 658-659; 563 NW2d 647 (1997). In light of our ruling, we need not reach this issue. We do note, however, that had the original complaint failed, the proposed amended complaint would likely have been futile, given that it essentially mimicked the original complaint, but with *fewer* allegations or claims of negligence.

EXHIBIT B

STATE OF MICHIGAN
CIRCUIT COURT FOR THE COUNTY OF WAYNE

AUDREY TROWELL,

Plaintiff,

vs.

PROVIDENCE HOSPITAL AND MEDICAL CENTERS, INC., a Michigan nonprofit corporation,

Defendant

Case No.: [ ]

Judge: [ ]

COMPLAINT AND JURY DEMAND

Jury Demand

COMES NOW Plaintiff, and makes her demand for trial by jury hereunder.

/s/ Carla D. Aikens
Carla D. Aikens
Attorney for Plaintiff

Civil Action

No civil action was heretofore filed arising from this occurrence between these parties.

Complaint

1. Plaintiff is a resident of the City of Detroit, County of Wayne State of Michigan, and received medical care and treatment from Defendant.

2. Defendant is a Michigan nonprofit corporation located in Southfield, Michigan.

3. The amount in controversy together with interest, costs, and attorneys' fees is more than $25,000.00.

Count I – Medical Negligence

4. Plaintiff incorporates by reference the above paragraphs.

5. On or about February 11, 2011, Plaintiff was admitted to Providence Hospital in Southfield, Michigan for an aneurysm that caused a stroke.

6. Plaintiff's stroke caused her to go into cardiac arrest, and she was placed in the intensive care unit ("ICU") in Defendant hospital to recover.

7. During her hospitalization, Plaintiff was assisted by agents and employees of Defendant hospital.

8. Defendant hospital had a duty to ensure that Plaintiff received proper assistance while a patient, including assistance ambulating to and from the bathroom while she was in the ICU.

9. Despite the fact that she had been advised that two nurses needed to assist Plaintiff to the bathroom, on several occasions, Defendant only employed one nurse to assist Plaintiff.

10. On one occasion, Defendant's nurse (upon information and belief, named "Dana") was tasked with assisting Plaintiff with using the bathroom.

11. Although "Dana" was tasked with assisting Plaintiff with using the bathroom, she dropped Plaintiff, which caused Plaintiff to hit her head on her wheelchair.

12. "Dana" attempted to assist Plaintiff again after dropping her, but instead she dropped Plaintiff a second time.

13. As a result of her falls, Plaintiff suffered a torn rotator cuff which has required multiple surgeries, and treatment continues into the present time.

14. Further, an MRI revealed that Plaintiff had suffered bleeding on the brain as a result of being dropped by Defendant's nurse, "Dana."

15. Defendant hospital was negligent in one or more of the following particulars, departing from the standard of care in the community:

a. Failure to ensure the safety of Plaintiff while in Defendant's hospital;

b. Failure to properly supervise the care of Plaintiff while in Defendant's hospital;

c. Failure to provide an adequate number of nurses to assist Plaintiff while in Defendant's hospital;

d. Failure to properly train "Dana" and other nurses in how to properly handle patients such as Plaintiff;

e. Failure to exercise proper care to prevent Plaintiff from being injured while in Defendant's hospital;

16. Defendant hospital was negligent through its agents, employees, and staff in failing to ensure the safety of Plaintiff.

17. The negligence of Defendant and its agents, employees and staff was the proximate of Plaintiff's damages set forth below.

18. As a direct and proximate result of Defendants' negligence, Plaintiff suffered pain, disability, the loss of full use of her shoulder/arm area due to shooting pain, numbness and weakness, resulting in falls and injuries. Plaintiff has suffered noneconomic damages of $2,500,000. Her resulting conditions are permanent.

19. As a further direct and proximate result of Plaintiffs disability, she can no longer work and has lost wages and earning capacity for the remainder of her life. This sum will be provided by evidence adduced at or before trial.

20. To treat her medical conditions set forth above, Plaintiff has and will continue to incur reasonable and necessary medical, prescription and surgical expenses in a sum to be adduced at or before trial.

21. WHEREFORE, Plaintiff seeks judgment against Defendant as follows:

a. On account of her noneconomic damages in the sum of $2,500,000;

b. On account of her economic damages as outlined above, in sums to be provided at trial; and

c. On account of her costs and necessary disbursements incurred herein.

Respectfully Submitted,

/s/ Carla D. Aikens

Carla D. Aikens, P69530
Carla D. Aikens, P.C.
Attorneys for Plaintiff
P.O. Box 6062
Vernon Hills, IL 60061

Dated this 10th day of February, 20104

EXHIBIT C

STATE OF MICHIGAN IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

TROWELL,AUDREY,, Plaintiff, NO: 2014-141798-NO

V

PROVIDENCE HOSPITAL & MEDICAL Defendant, HON. COLLEEN A. O'BRIEN

In the matter of:

ORDER REGARDING MOTION

Motion Title: **Defendant's motion for summary disposition**

The above named motion is:

- [x] **granted.**
- [ ] **granted in part, denied in part.**
- [ ] **denied.**
- [x] **for the reasons stated on the record.**

In addition: This order resolves the last pending claim and closes the case.

DATED: 04/08/2015

/s/ Judge Colleen A. O'Brien

HON. COLLEEN A. O'BRIEN

Circuit Court Judge

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EXHIBIT D

STATE OF MICHIGAN
CIRCUIT COURT FOR THE COUNTY OF WAYNE

AUDREY TROWELL,
Plaintiff,
vs.
PROVIDENCE HOSPITAL AND MEDICAL CENTERS, INC., a Michigan nonprofit corporation.
Defendant

Case No.: 14-001660-NO

HON. BRIAN R. SULLIVAN

STIPULATED ORDER TO TRANSFER VENUE

At a session of said Court held in the City of Detroit,
County of Wayne, State of Michigan
on: this _____ day of 3/26/2014, 2014
PRESENT: Honorable Brian R. Sullivan

This matter, having come before the Court on Defendant's Motion to Transfer Venue, and the parties having stipulated to the relief sought therein evidenced by counsels' signatures appearing below and the Court having been fully advised in the premises:

IT IS HEREBY ORDERED that THEREFORE, IT IS HEREBY STIPULATED AND AGREED:

1. That this matter should be transferred to the Oakland County Circuit Court on the following conditions:

   a. Defendant shall file and serve an answer to Plaintiff's complaint by no later than 10 days after the Clerk of the Oakland County Circuit Court gives notice that the case has been received and the new case number has been assigned.

EXHIBIT E

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

AUDREY TROWELL,

Plaintiff, JUDGE COLLEEN A. O'BRIEN

-vs- C/A No: 14-141798-NO

PROVIDENCE HOSPITAL AND MEDICAL CENTERS, INC., a Michigan Non-Profit Corporation,

Defendant.

/

CARLA D. AIKENS (P69530)
Attorney for Plaintiff
P. O. Box 6062
Vernon Hills, Illinois 60061
(215) 219-7404

WILSON A. COPELAND, II (P23837)
Attorney for Defendant
615 Griswold Street, Suite 531
Detroit, Michigan 48226
(313) 961-2600

/

DEFENDANT, PROVIDENCE HOSPITAL AND MEDICAL CENTERS, INC.'S, MOTION FOR SUMMARY DISPOSITION

NOW COMES, Defendant herein, PROVIDENCE HOSPITAL AND MEDICAL CENTERS, INC., by and through its Attorneys, GRIER, COPELAND & WILLIAMS, P. C., BY: WILSON A. COPELAND, II, and as its Motion for Summary Disposition pursuant to MCR 2.116 (C)(7) and (8), states as follows:

1. That Plaintiff filed the within Complaint on February 11, 2014 in the Wayne County Circuit Court. (Exhibit A).

2. That Plaintiff filed her Complaint as a general negligence action; however, the allegations therein actually sound in medical malpractice.

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3. That specifically, "Count I – Medical Negligence [paragraph] 15" of Plaintiff's Complaint reads in pertinent part:

> 15. Defendant hospital was negligent in one or more of the following particulars, **departing from the standard of care** in the community: . . .
>
> b. **Failure to properly supervise** the care of Plaintiff while in Defendant's hospital;
>
> c. **Failure to provide an adequate number of nurses** to assist Plaintiff while in Defendant's hospital;
>
> d. **Failure to properly train "Dana" and other nurses** in how to properly handle patients such as plaintiff;
>
> e. **Failure to exercise proper care** to prevent Plaintiff from being injured while in Defendant's hospital;

(Exhibit A, Emphasis added).

4. That pursuant to MCL 600.5805(6), the statute of limitations for actions sounding in medical malpractice is two years; the date on which the acts Plaintiff complains occurred on February 11, 2011; thereby requiring Plaintiff to properly file her Complaint no later than February 11, 2013 absent tolling.

5. That pursuant to MCL §600.2912b(1), prior to filing a medical malpractice action, a prospective plaintiff is required to serve the prospective defendant with a Notice of Intent to File Claim (NOI) and then wait the statutory 182-day notice period prior to commencing a cause of action sounding in medical malpractice. The statute of limitations is tolled during this 182-day notice period if it is served on the prospective defendant prior to the expiration of the statute of limitations.

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6. That the Plaintiff herein did not serve Providence Hospital with an NOI prior to filing the within Complaint; thus, the statute of limitations was not tolled and continued to run.

7. That as a result of Plaintiff's failure to comply with the statutory requirements of MCL §600.2912b(1), the appropriate remedy is dismissal of Plaintiff's claim without prejudice; however, since the statute of limitations has expired, dismissal with prejudice is appropriate herein.

8. That in addition, pursuant to MCL §600.2912d(1), a Plaintiff is required to file an Affidavit of Merit with a Complaint sounding in medical malpractice.

9. That the Plaintiff's Complaint herein is devoid of an Affidavit of Merit.

10. That failure to file an Affidavit of Merit with the Complaint renders the Complaint null and void and in the case where the statute of limitations has expired, the appropriate sanction for said failure is dismissal with prejudice.

WHEREFORE, Defendant, PROVIDENCE HOSPITAL AND MEDICAL CENTERS, INC., respectfully requests that this Honorable Court dismiss the within cause with prejudice.

Respectfully submitted,

GRIER, COPELAND & WILLIAMS, P. C.

BY: Wilson A. Copeland II/ems

WILSON A. COPELAND, II (P23837)
Attorney for Defendant
615 Griswold Street, Suite 531
Detroit, Michigan 48226
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Dated: January 9, 2015

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

AUDREY TROWELL,

Plaintiff, JUDGE COLLEEN A. O'BRIEN

-vs- C/A No: 14-141798-NO

PROVIDENCE HOSPITAL AND
MEDICAL CENTERS, INC.,
a Michigan Non-Profit Corporation,

Defendant.

/

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WILSON A. COPELAND, II (P23837)
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/

DEFENDANT, PROVIDENCE HOSPITAL AND MEDICAL CENTERS, INC.'S, BRIEF IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION

NOW COMES, Defendant herein, PROVIDENCE HOSPITAL AND MEDICAL CENTERS, INC., by and through its Attorneys, GRIER, COPELAND & WILLIAMS, P. C., BY: WILSON A. COPELAND, II, and as its Brief in Support of Motion for Summary Disposition pursuant to MCR 2.116 (C)(7) and (8), states as follows:

In the case at bar, Plaintiff alleges she was admitted into the intensive care unit (ICU) at Defendant hospital following a cardiac arrest. Plaintiff further alleges that while in the ICU she was dropped by a nurse assisting her to the bathroom and that this incident was the result of breaches in "the standard of care" by Defendant Providence Hospital.

Plaintiff's Complaint reads in pertinent part:

> "15. Defendant hospital was negligent in one or more of the following particulars, **departing from the standard of care** in the community: . . .
>
> b. **Failure to properly supervise** the care of Plaintiff while in Defendant's hospital;
>
> c. **Failure to provide an adequate number of nurses** to assist Plaintiff while in Defendant's hospital;
>
> d. **Failure to properly train "Dana" and other nurses** in how to properly handle patients such as Plaintiff;
>
> e. **Failure to exercise proper care** to prevent Plaintiff from being injured while in Defendant's hospital;"

(Exhibit A, p. 3).

Thus, while the Plaintiff herein may have elected to file her Complaint under the general negligence designation, "a complaint cannot avoid the application of the procedural requirements of a malpractice action by couching its cause of action in terms of ordinary negligence." *Dorris v. Detroit Osteopathic Hospital*, 460 Mich. 26, 43; 594 NW2d 455 (1999), quoting *McLeod v. Plymouth Court Nursing Home*, 957 F. Supp. 113, 115 (ED Mich, 1997).

Determining whether a claim sounds in ordinary negligence or medical malpractice requires a two-step analysis. The first element is whether a professional relationship existed between the Plaintiff and Providence Hospital. This is not and cannot be disputed, thus we move to step two.

The second step requires determination of whether the alleged acts of negligence "raise issues that are within the common knowledge and experience

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of the jury or, alternatively, raise questions involving medical judgment." *Dorris, supra* at 46.

The Michigan Supreme Court has already ruled that issues concerning supervision of medical staff, training of medical staff and determining the number of medical staff necessary to supervise and/or assist patients all require "medical judgment."

Dorris, was consolidated with *Gregory v. Heritage Hospital*, thus, the Court analyzed Ms. Gregory's allegations. Ms. Gregory alleged that she was attacked by a hospital psychiatric patient as a result of the Heritage Hospital's failure to have adequate staffing present to supervise and monitor patients. The *Dorris* Court held that "allegations concerning staffing decisions and patient monitoring involve questions of professional medical management and not issues of ordinary negligence that can be judged by the common knowledge and experience of a jury." *Dorris, supra* at 47.

In its analysis, the Court noted that in *Bronson v. Sisters of Mercy Health Corp.*, 175 Mich. App. 647; 438 NW2d 276 (1989), the Court of Appeals correctly held that the plaintiff's claims that the defendant hospital failed to supervise and adequately maintain its staff are allegations of medical malpractice not ordinary negligence. *Dorris, supra* at 45.

Like the plaintiffs in *Gregory* and *Bronson*, the Plaintiff herein has alleged failure to properly train medical staff (nurses), failure to properly supervise medical staff, and failure to have sufficient medical staff necessary to protect

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Plaintiff from injury - - all of which are allegations that sound in medical malpractice.

Also, setting the allegations aside, the very language chosen for the Complaint utilizing "standard of care" as the pivotal point of the allegations is reflective of a phrase that is unique to malpractice litigation.

Since Plaintiff's Complaint sounds in medical malpractice, Plaintiff must comply with the statutory requirements pertaining to medical malpractice actions. Specifically, a plaintiff is required to file a medical malpractice claim within two (2) years of the date the alleged malpractice occurred. (See MCL §600.5805(6)). Plaintiff alleges that the malpractice occurred on February 11, 2011; therefore, the statute of limitations expired on February 11, 2013, one year before Plaintiff filed her Complaint.

Moreover, pursuant to MCL §600.2912b(1), prior to filing a Complaint alleging medical malpractice, the potential plaintiff must first serve the potential defendant with a Notice of Intent to File Claim (NOI). Upon service of the NOI, the statute of limitations is tolled for up to 182 days; during this 182-day notice period the plaintiff is prohibited from filing her Complaint unless certain events occur – these events/exceptions are not pertinent to the within litigation.

MCL §600.2912b(1) reads in pertinent part:

> . . . a person shall not commence an action alleging medical malpractice against a health professional . . . unless the person has given the health professional . . . written notice under this section not less than 182 days before the action is commenced.

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Plaintiff did not serve Defendant with an NOI prior to filing the Complaint herein. In fact, to date, Plaintiff has yet to serve Defendant with an NOI.

The remedy for failure to serve a Defendant with an NOI is dismissal without prejudice. *Neal v. Oakwood Hospital Corp.*, 226 Mich. App. 701; 575 NW2d 68 (1997); *Bush v. Shabahang*, 484 Mich. 156, 177; 772 NW2d 272 (2009). In *Bush*, the Court analyzed MCL §600.2912b for the purpose of determining, not only application, but the consequences of non-compliance. The Court noted that "the plain language of § 2912b(1) mandates that a plaintiff shall not commence an action for medical malpractice without filing a timely NOI. *Bush, supra* at 172.

Thereafter, the *Bush* Court reviews the legislative history to determine the appropriate sanction for failure to comply with § 2912b and notes that the purpose of § 2912b is to promote "settlement without the need for formal litigation. . . ." *Bush, supra* at 174. Thus, the *Bush* Court held that affirmed prior lower Court holdings and held that consequence of failing to comply with § 2912b is dismissal without prejudice. *Id.*, at 175.

Further, in addition to being required to serve the potential defendant with an NOI, Plaintiff must comply with MCL §600.2912d. That is, the Plaintiff's Complaint ***must be*** accompanied by an Affidavit of Merit. Plaintiff's Complaint was not accompanied by an Affidavit of Merit.

Thus, in addition to failing to comply with § 2912b, the Plaintiff herein failed to comply with § 2912d as Plaintiff's Complaint is devoid and absent of an

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b. Defendant waives any defense to Plaintiff's complaint listed in MCR 2.116(C)(1)-(3).

2. That the parties hereby jointly request the Court to issue its order approving and implementing this stipulation upon the filing of this stipulation, without further motion, hearing and/or other proceedings; and

3. That the Court's order incorporating or otherwise implementing and consistent with the terms of this stipulation shall be effective immediately upon issuance.

This is a final order which closes this case in this Court.

IT IS SO STIPULATED AND ORDERED.

Brian R. Sullivan

Wayne County Circuit Court Judge

I do hereby stipulate to entry of the above order
And approve same as to form and content:

/s/ Carla D. Aikens
Carla D. Aikens (P69530)
Attorney for Plaintiff

/s/ Wilson Copeland (with permission)
Wilson Copeland (P23837)
Attorney for Defendant

Affidavit of Merit. The Michigan Court considered the effect/impact on a Complaint when the Complaint is not accompanied by an Affidavit of Merit in *Scarsella v. Pollack*, 461 Mich. 547, 548; 607 NW2d 711 (2000).

In *Scarsella*, the Plaintiff filed his medical malpractice Complaint against the defendant approximately two to three weeks prior to the expiration of the statute of limitations; however, the Complaint was not accompanied by an Affidavit of Merit. *Scarsella*, 461 Mich. at 548. The Trial Court ruled that the failure to file an Affidavit of Merit with the Complaint renders the filing a "nullity" and is "insufficient to commence his action" and since the statute of limitations expired, the Complaint was dismissed with prejudice. *Id.*, at 549. The Court of Appeals and Michigan Supreme Court affirmed the Trial Court's ruling. *Id.*

Therefore, since the alleged malpractice herein occurred on February 11, 2011, the Plaintiff herein was required to file her Complaint with an Affidavit of Merit on or before February 11, 2013; she did not.

Not only did Plaintiff fail to file her Complaint by February 11, 2013, it was not accompanied by an Affidavit of Merit and is thereby rendered a "nullity." As such, pursuant to *Scarsella*, the Complaint filed by Plaintiff herein must be dismissed with prejudice as Plaintiff failed to file said Complaint on a timely basis and the Court is asked to remember that before the questions of timeliness and the Affidavit of Merit can be addressed, the first requirement of a Notice of Intent must be met, and it was not, thus this matter fails on all three elements it would need to sustain viability.

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WHEREFORE, Defendant, PROVIDENCE HOSPITAL AND MEDICAL CENTERS, INC., respectfully requests that this Honorable Court dismiss the within cause with prejudice.

Respectfully submitted,

GRIER, COPELAND & WILLIAMS, P. C.

BY: Wilson A. Copeland II (P23837)
WILSON A. COPELAND, II (P23837)
Attorney for Defendant
615 Griswold Street, Suite 531
Detroit, Michigan 48226
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Dated: January 9, 2015

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CERTIFICATE OF SERVICE

I, Pamela D. Ray hereby certify that on January 9, 2015, I electronically filed Defendant, Providence Hospital and Medical Centers, Inc.'s Motion for Summary Disposition, Brief in Support of Motion, Notice of Hearing, Praecipe for Motion and Certificate of Service with the Oakland County Clerk of the Court using the Wiznet system which will send electronic notification to the following Attorney: CARLA D. AIKENS (P69530)

BY: /s/ PAMEL D. RAY

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EXHIBIT F

STATE OF MICHIGAN
CIRCUIT COURT FOR THE COUNTY OF OAKLAND

AUDREY TROWELL, Plaintiff, vs. PROVIDENCE HOSPITAL AND MEDICAL CENTERS, INC., a Michigan nonprofit corporation. Defendant	Case No.: 14-141798-NO HON. COLLEEN A. O'BRIEN

CARLA D. AIKENS (P69530) CARLA D. AIKENS, P.C. Attorney for Plaintiffs 675 Lakeview Parkway #6062 Vernon Hills, IL 60061 Phone: (215) 219-7404 Email: carla@aikenslawfirm.com	WILSON A. COPELAND, II (P23837) GRIER, COPELAND & WILLIAMS, P.C. Attorney for Defendant 615 Griswold Street, Suite 531 Detroit, Michigan 48226 Phone: (313) 961-2600 Email: wc2nd@gcwpc.com

PLAINTIFF'S MOTION FOR RECONSIDERATION AND TO AMEND COMPLAINT

NOW COMES Plaintiff, AUDREY TROWELL, by and through her attorneys, CARLA D. AIKENS, P.C., and for her Motion for Reconsideration and to Amend Complaint, states as follows:

1. Plaintiff filed this action on or about February 11, 2014, for negligence in connection with Defendant's treatment of Plaintiff on or about February 11, 2011.
2. Defendant filed a Motion for Partial Summary Disposition on January 9, 2015, which was granted by this court on April 8, 2015.
3. MCR 2.119(F)(3) states that in a Motion for Reconsideration, "[t]he moving party must demonstrate a palpable error by which the court and the parties have been

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misled and show that a different disposition of the motion must result from correction of the error."

4. Here, palpable error was made in the following manners:
    a. Plaintiff's claims sound in ordinary negligence, and not in medical malpractice.
    b. Even if this court concedes that some of Plaintiff's claims sound in medical malpractice, this case should be allowed to proceed on the ordinary negligence claims, rather than be dismissed in its entirety.
5. Plaintiff also requests that she be granted the right to amend her complaint to remedy any defects.
6. MCR 2.118(A)(2) provides that "...a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires."
7. Plaintiff has already filed the present matter against Defendant arising out of the negligent actions at Defendant hospital. Because the amended complaint would arise out of the same occurrence that is the subject of the present litigation, it would be properly consolidated with the present claim.
8. Because the Michigan Court Rules dictate that Plaintiff should be allowed to amend her complaint, and Plaintiff has done nothing that would justify not being allowed to amend her complaint, Plaintiff's request to amend the complaint should be granted.

WHEREFORE the Plaintiff prays that this Honorable Court grant its Motion for Reconsideration and to Amend Complaint as brought herein, and grant any further relief deemed just and equitable.

Respectfully submitted,

CARLA D. AIKENS, P.C.

By: /s/ Carla D. Aikens
Carla D. Aikens, Esq. (P69530)
Attorney for Appellants
675 Lakeview Parkway #6062
Vernon Hills, IL 60061
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Date: April 29, 2015

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon all counsel of record on April 29, 2015via e-filing.

I DECLARE THAT THE STATEMENT ABOVE IS TRUE TO THE BEST OF MY INFORMATION, KNOWLEDGE AND BELIEF.

/s/ Carla D. Aikens
Carla D. Aikens

STATE OF MICHIGAN
CIRCUIT COURT FOR THE COUNTY OF OAKLAND

AUDREY TROWELL, Plaintiff, vs. PROVIDENCE HOSPITAL AND MEDICAL CENTERS, INC., a Michigan nonprofit corporation. Defendant	Case No.: 14-141798-NO HON. COLLEEN A. O'BRIEN

CARLA D. AIKENS (P69530) CARLA D. AIKENS, P.C. Attorney for Plaintiffs 675 Lakeview Parkway #6062 Vernon Hills, IL 60061 Phone: (215) 219-7404 Email: carla@aikenslawfirm.com	WILSON A. COPELAND, II (P23837) GRIER, COPELAND & WILLIAMS, P.C. Attorney for Defendant 615 Griswold Street, Suite 531 Detroit, Michigan 48226 Phone: (313) 961-2600 Email: wc2nd@gcwpc.com

BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR RECONSIDERATION AND TO AMEND COMPLAINT

I. STATEMENT OF FACTS

On February 11, 2011, Plaintiff Trowell was admitted to Providence Hospital in Southfield, Michigan for an aneurysm that caused a stroke. Plaintiff Trowell's stroke caused her to go into cardiac arrest and she was placed in the intensive care unit (ICU) in Defendant hospital.

During her hospitalization, Plaintiff Trowell was assisted by agents and employees of Defendant hospital. Despite Plaintiff Trowell having been advised that two nurses needed to assist her to the bathroom, on several occasions, Defendant only employed one nurse to assist her. On one occasion, Defendant's nurse (upon information and belief, referred to as "Dana" in

Plaintiff's original Complaint; Defendant later advised Plaintiff's counsel that her name is actually named Dana McCorkle) was tasked with assisting Plaintiff Trowell with using the bathroom. Although Dana McCorkle was tasked with assisting Plaintiff Trowell with using the bathroom, she dropped Plaintiff Trowell, which caused Plaintiff Trowell to hit her head on her wheelchair. Dana McCorkle attempted to assist Plaintiff Trowell again after dropping her, but instead she dropped Plaintiff Trowell a second time.

As a result of her falls, Plaintiff Trowell suffered a torn rotator cuff which has required multiple surgeries and treatment. Further, an MRI revealed that Plaintiff Trowell had suffered bleeding of the brain as a result of being dropped by Defendant's nurse, Dana McCorkle.

II. ARGUMENT

The Michigan Court of Appeals has held that "Medical professionals may be liable for ordinary negligence as well as for malpractice." MacDonald v. Barbarotto, 411 N.W.2d 747, 750, 161 Mich. App. 542 (Mich. App., 1987). See also Adkins v. Annapolis Hospital, 420 Mich. 87, 95, n. 10, 360 N.W.2d 150 (1984); Becker v. Meyer Rexall, Drug Co., 141 Mich. App. 481, 367 N.W.2d 424 (1985); and Nemzin v. Sinai Hospital, 143 Mich. App. 798, 804, 372 N.W.2d 667 (1985). In Bryant v. Oakpointe Villa Nursing Center, 684 N.W.2d 864, 471 Mich. 411 (2004) the Michigan Supreme Court held "The fact that an employee of a licensed health care facility was engaging in medical care at the time the alleged negligence occurred means that the plaintiff's claim may possibly sound in medical malpractice; it does not mean that the plaintiff's claim certainly sounds in medical malpractice." Id. at 871.

To distinguish medical malpractice claims from negligence claims, there are two questions that must be asked. The first is "whether the claim pertains to an action that occurred within the course of a professional relationship;" and the second is "whether the claim raises

questions of medical judgment beyond the realm of common knowledge and experience." Id. If the answer is "yes" to both of these questions, then the action is considered medical malpractice. Id.

In the present case, Plaintiff Trowell's complaint alleged that Defendant hospital was negligent in the following ways:

a. Failure to ensure the safety of Plaintiff while in Defendant hospital;

b. Failure to properly supervise the care of Plaintiff while in Defendant's hospital;

c. Failure to provide an adequate number of nurses to assist Plaintiff while in Defendants hospital;

d. Failure to properly train Dana McCorkle and other nurses in how to properly handle patients such as Plaintiff;

e. Failure to exercise proper case to prevent Plaintiff from being injured while in Defendant's hospital.

These allegations sound in negligence, as opposed to medical malpractice. Applying the analysis in Bryant, the answer to the first question is not in dispute. The fall which Plaintiff Trowell suffered was within the course of a professional relationship. The answer to the second question must be answered in the negative, as the facts raise issues that are within the common knowledge of a jury and do not involve medical judgment.

A. Failure to Train

In Bryant, the Plaintiff patient alleged that Defendant hospital was negligent, one of those allegations being a failure to train the nursing assistants to "recognize and counter the risk of positional asphyxiation post by bed rails." Bryant at 867. In this case, the Michigan Supreme

Court held that this specific allegation would fall under medical malpractice because assessing the risks of asphyxia would require expert testimony. Id. at 873. Importantly, the court went on to say, "That is not to say, however, that all cases concerning failure to train health care employees in the proper monitoring of patients are claims that sound in medical malpractice. The pertinent question remains whether the alleged facts raise questions of medical judgment or questions that are within the common knowledge and experience of the jury." Id.

Applying this reasoning to the case at hand, simply because Plaintiff Trowell alleged failure to properly train Dana McCorkle does not automatically render this as a malpractice action. As established, nurse Dana McCorkle wasn't engaged in administering any form of medical care or treatment, and the breach of duty did not arise from the administration of professional medical treatment. She was assisting Plaintiff Trowell to the bathroom. There is no question regarding professional medical judgment, unlike in Bryant, where the fact finder needed expert testimony to determine whether the nurses were adequately trained in restraint systems. The question of whether Defendant failed to properly train nurse Dana McCorkle to prevent Plaintiff from being injured is one that can and should be answered without any specialized knowledge, by a jury.

B. Failure to Supervise and Failure to Provide Adequate Nurses

Defendant likened the present case to Bronson v. Sisters of Mercy Health Corp., 175 Mich. App. 647, 438 N.W.2d 276 (Mich. App. 1989). In Bronson, the plaintiff filed an ordinary negligence action against her doctor because she suffered cardiorespiratory arrest as a result of the doctor's administration of an epidural steroid block. Id. at 277. Based on the facts, the Court of Appeals held that the plaintiff's claims concerning supervision, and selection and retention of

medical staff, were claims based in malpractice. Id. at 279. However, this does not necessitate that all claims relating to supervision or selection of staff issues are grounded in malpractice. As with any legal analysis of a case, the facts surrounding the claims must be considered. In Bronson, the Plaintiff claimed that defendant hospital was negligent because they granted staff privileges to the doctor, failed to discover that the doctor was no longer competent, failed to supervise the competency of the doctor, failed to fully investigate prior acts of negligence by the doctor, failed to take disciplinary action against the doctor, and failed to revoke the doctor's staff privileges. Id. at 277.

Unlike the present case, the doctor in Bronson was actually engaged in performing allegedly negligent medical treatment. The plaintiff's claim regarding medical staffing was an issue of competency, which could not reasonably be judged by a jury. In the case at hand, simply because Plaintiff Trowell alleged failure to supervise Plaintiff's care and failure to provide adequate nurses, for instance, does not automatically render this as a malpractice action. Plaintiff Trowell was informed that she needed two nurses to assist her to the bathroom. The fact that only one nurse assisted her, even after she fell the first time, is evidence that there was a lack of supervision and an adequate number of nurses. These omissions can and should be evaluated without expert testimony, as they may be easily be grasped by the jury.

C. Failure to Ensure Safety and Failure to Exercise Proper Care

In Bryant, Plaintiff also alleged that Defendant failed to take steps to protect plaintiff because Defendant had notice of the risk of asphyxiation and yet "Defendant did nothing to rectify it." The court held:

> This claim sounds in ordinary negligence. No expert testimony is necessary to determine whether defendant's employees should have taken some sort of corrective action to prevent future harm after learning of the hazard. The fact-

> finder can rely on common knowledge and experience in determining whether defendant ought to have made an attempt to reduce a known risk of imminent harm to one of its charges.
>
> Bryant at 875.

The "failure to take steps" allegation in Bryant is similar to the "failure to take corrective action" allegation in Sawicki v. Katvinksy, No. 318818, Mich. App. (March 17, 2015). In this case, Plaintiff Sawicki sustained injuries after she fell from a raised toilet seat at Defendant hospital. Sawicki underwent knee replacement surgery and was being assisted by Katvinksy, a technical partner at the hospital. Id. at 1. Plaintiff testified that she yelled "Whoa!" once she sat down on the seat. Id. Katvinsky still left her alone despite being aware of the risks posed by the unsteady toilet seat and her risk of falling due to her physical condition. Id. The court held that "No expert testimony is necessary to show that the defendant acted negligently by failing to take any corrective action after learning of the problem . . . Accordingly, this claim does not involve medical judgment, nor does it require knowledge of the standards of care applicable to medical caregivers or knowledge of technical or scientific matters." Id. at 3 (citing Bryant at 876).

In McIver v. St. John Macomb Oakland Hospital, No. 303090, Mich. App. (October 2, 2012) Plaintiff, who suffered from multiple sclerosis and dementia, fell from a chair that had been placed on a wet floor in her hospital bathroom. Id. at 1. Because of her history of falling, the hospital utilized restraints, and before her fall, the staff noted her unsteadiness and confusion. Plaintiff brought a negligence action against the hospital. Id. at 1, 2. The court held:

> The narrow allegation that McIver was left alone in the bathroom after being seated on an unsafe chair placed on a wet floor sets forth a claim within the realm of a jury's common knowledge and experience. Laypersons are capable of understanding these simple facts. No expert testimony is necessary to establish that it is unreasonable to direct a patient to sit in an unstable chair located on a wet floor, particularly a patient suffering from dementia and unsteadiness. Nor do we detect any scientific or technical basis for expert testimony, given these

> allegations. Accordingly, McIver's negligence claim relating to her placement in the chair sounds in ordinary negligence.
>
> Id. at 5.

In the present case, Plaintiff Trowell alleged failure to exercise proper care and failure to ensure safety, both of which sound in ordinary negligence. The court's reasoning in Bryant, Sawicki, and McIver that no expert testimony was necessary to assess Defendant's negligence warrants application to the present case. For instance, just as the defendants in these three cases, nurse Dana McCorkle was aware or should have been aware of Plaintiff Trowell's physical condition, which may make her more susceptible to a fall. In these cases Defendants were aware of the Plaintiffs' vulnerabilities, and "either disregarded the risks or neglected to address them." McIver at 6. Secondly, nurse Dana McCorkle was also aware that Plaintiff required two nurses to assist her, yet still proceeded on her own. Lastly, after dropping her the first time, she did nothing to rectify her mistake, and thus dropped her a second time. For both falls, she was aware of all the aforementioned conditions and she failed to take the necessary steps to protect Plaintiff. In this case, ensuring that Plaintiff Trowell did not fall did not require any specialized or scientific knowledge, but rather commonsense; and in the words of the court in McIver, was a matter of "routine decision-making." Id.

D. "Falling Cases" Sounding in Ordinary Negligence

In the present case, Plaintiff Trowell fell at the hands of the nurse Dana McCorkle. Simply falling when there is professional relationship established between the injured and the medical facility or staff and when there is alleged negligence on the part of the medical staff, does not automatically render a claim as solely medical malpractice. **Plaintiff could not locate a single case where a nurse dropping a plaintiff sounded in medical malpractice.** For

instance, the Michigan Court of Appeals has held that "In Michigan, a claim by a patient who has fallen in a hospital or other licensed health facility may be brought against that facility as a medical malpractice claim or as a claim for ordinary negligence." McLeod v. Plymouth Court Nursing Home, 957 F. Supp. 113 (E.D. Mich., 1997). See also MacDonald v. Barbarotto,161 Mich. App. 542, 549 (Mich. App. 1987).

In McLeod, Plaintiff, a nursing home resident, filed an ordinary negligence claim against Defendant nursing home, claiming that as a result of Defendant leaving her wheelchair unlocked, Plaintiff fell while attempting to get to her wheelchair and fractured her hip. Defendant attempted to dismiss the action on the basis that Plaintiff failed to file a written notice of her intent to file a claim, as required by medical malpractice law. The court allowed Plaintiff's claim to proceed on its ordinary negligence claim because "[n]o reference is made to any breach or violation of a duty to exercise the degree of skill, care, or diligence exercised by hospitals in the same or similar locality" and because "the facts alleged present issues within the common knowledge and experience of the jury rather than those of medical judgment." McLeod at 115.

In Gold v. Sinai Hospital of Detroit, Inc. 5 Mich. App. 368 (Mich. App. 1966), plaintiff patient told the nurse that she felt dizzy and "would not be able to make it.' The nurse's promised assistance went unfulfilled and the plaintiff fell and was injured. Similarly, in Fogel v. Sinai Hospital of Detroit, 2 Mich. App. 99 (Mich. App. 1965) plaintiff patient requested assistance from a nurse's aide to get to the bathroom. Plaintiff cautioned the aide that she would need more than one aide, but the aide still decided to help her on her own. The plaintiff fell and was injured. Neither of these cases brought forth a malpractice question, but rather an ordinary negligence question. Neither case required expert testimony because the question of whether there was a breach of the alleged duty of care could be appropriately answered by a jury.

In Sheridan v. West Bloomfield Nursing & Convalescent Center, Inc., No. 272205, Oakland Circuit Court (March 6, 2007), Plaintiff representative alleged that Defendants were negligent when two nurses dropped plaintiff while she was moved from her bed to a wheelchair using a "gait belt." The Michigan Court of Appeals held that the trial court erred in dismissing the claims in plaintiff's amended complaint. The court went on to hold:

> Plaintiff is not challenging the decision to move the decedent from her bed, the decision to use a gait belt, or the manner in which the gait belt was fastened to her body. The sole issue is whether, having decided to use and having secured the gait belt, defendants acted reasonably when they failed to maintain a secure grip on plaintiff's decedent and dropped her or allowed her to fall on the floor. Resolution of this issue is within the common knowledge and experience of an ordinary juror and does not require expert testimony concerning the exercise of medical judgment.
>
> Id. at 2.

In the present case, Plaintiff Trowell was dropped twice by nurse Dana McCorkle. The reasoning in McLeod, Sheridan, and the two cases involving Sinai Hospital support the argument that expert testimony is not required in order for a jury to decide whether a nurse dropping someone is negligence. Plaintiff Trowell is not challenging the use of any medical treatment or action, but is asking whether nurse Dana McCorkle acted reasonably when she failed to keep Plaintiff Trowell within her grasp. The facts are clear, and a jury, without testimony from an expert, would be able to discern that Plaintiff was not handled properly.

E. Negligence Claims of Plaintiff's Complaint must be Preserved

Plaintiff Trowell's claims clearly sound in negligence. However, even if we concede that the failure to train claim sounds in medical malpractice, Plaintiff Trowell has viable claims that clearly sound in ordinary negligence, as previously demonstrated. Even if this court strikes some of the claims within Plaintiff Trowell's complaint, the court must still preserve those claims

which sound in ordinary negligence. This type of bifurcation of the complaint has occurred in a number of cases.

For instance, in Bryant, the court determined that two of plaintiff's claims sounded in medical malpractice, one in strict liability, and the remaining in ordinary negligence. Even though plaintiff's medical malpractice claims were time-barred, the court allowed them to proceed, along with the ordinary negligence claim. Bryant at 877. In Sawicki, the Michigan Court of Appeals also preserved plaintiff's ordinary negligence claims, holding "Because. . . some of plaintiffs' claims sound in ordinary negligence, it does not fully constitute a claim sounding in medical malpractice and will survive despite the existence of the medical malpractice claims." Sawicki at page 6. See also McIver page 7.

Further, Plaintiff should also be allowed to proceed to trial on the merits of its clearly valid claims. The Michigan Supreme Court has stated:

> Our legal system is also committed to a countervailing policy favoring disposition litigation on the merits, see Hurt v. Cambridge, 21 Mich App 652; 176 NW2d 450 (1970), which will frequently be found to be overriding. Thus, appellate courts have often warned "that dismissal with prejudice is . . . to be applied only in extreme situations."
>
> North v. Department of Mental Health, 427 Mich. 659, 662 (1986) (internal citation omitted).

F. Res Ipsa Loquitur as an Alternative Theory

In Thomas v. McPherson Community Health Center, 400 N.W.2d 629, 155 Mich. App. 700 (Mich. App. 1987), the Michigan Court of Appeals held that "[I]n an action for malpractice against a hospital, expert testimony is required to establish the applicable standard of conduct, the breach of that standard, and causation. . . There are two closely connected exceptions to this requirement. Where the negligence claimed is 'a matter of common knowledge and observation,'

no expert testimony is required. And, where the elements of the doctrine of res ipsa loquitur are satisfied, negligence can be inferred." Id. at 631.

In *Neal's Estate v. Friendship* Manor Nursing Home, the decedent was a mentally handicapped infant who was a patient at Defendant Nursing Home. The decedent was burned after a hot water bottle was placed on his bare abdomen by an agent at the nursing home. The trial court granted Plaintiff's Motion for Summary Judgment, which alleged that there was no existence of a genuine issue of material fact because negligence had clearly been committed. The trial court applied the theory of res ipsa loquitur, but still left the issues of proximate cause and damages for trial. On Defendant's appeal, the Court of Appeals held that there must be four conditions in order for this doctrine to apply:

1. The event must be of a kind which ordinarily does not occur in the absence of someone's negligence.

2. The event must have been caused by an agency or instrumentality within the exclusive control of the defendant.

3. The event must not have been due to any voluntary action or contribution on the part of the plaintiff.

4. Evidence of the true explanation of the event must be more readily accessible to the defendant than to the plaintiff. Gadde v. Michigan Consolidated Gas Co., supra, 124, 139 N.W.2d 722.

Id. at 764.

Applying the reasoning in Thomas, expert testimony should not be required in the present case under both exceptions: the first being that Plaintiff Trowell's claims are a matter of common knowledge, and the second being that the theory of res ipsa loquitur applies. Even if this Court were not to accept that Plaintiff Trowell's claims are not a matter of common knowledge, Plaintiff Trowell's claims should still proceed on the theory of res ipsa loquitur.

The present case complies with the factors outlined in Neal in the following manner: 1) a patient falling while getting assistance from a nurse or other medical professional is clearly an event that does not ordinarily occur without negligence; 2) Plaintiff Trowell's fall was caused by nurse Dana McCorkle dropping Plaintiff, who was in the exclusive control of Defendant; 3) Plaintiff Trowell's fall was not attributed to any actions she took; and 4) evidence of the true explanation of the event is more readily accessible to Defendant than to Plaintiff Trowell, as Plaintiff Trowell was in Defendant hospital's care as a patient and was assisted by an agent of the hospital, who would reasonably be expected to possess documentation of the event that transpired.

G. Request to Amend Complaint

MCR 2.118(A)(2) provides that "...a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires." "Because a court should freely grant leave to amend a complaint when justice so requires, a motion to amend should ordinarily be denied only for particularized reasons." Wormsbacher v Philip R. Seaver Title C.o Inc., 284 Mich App 1, 8 (2009) (citing Miller v Chapman Contracting, 477 Mich 102, 105; 730 NW2d 462 (2007)). Motions to amend may be denied for reasons including "undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the defendant, or futility." Wormsbacher, 284 Mich App at 8.

Here, Plaintiff Trowell has valid claims that negligence was committed by Defendant. The amended complaint would arise out of the same transaction and occurrence that is the subject of the present litigation. Further, Plaintiff Trowell has done nothing that should prevent

her from being allowed to amend her Complaint. There has been no undue delay, bad faith or dilatory motive on the part of Plaintiff in seeking amendment. Further, if amendment were denied, Plaintiff would be time-barred from a separate claim.

III. CONCLUSION

In keeping with the aforementioned Michigan case law, medical professionals may be liable for ordinary negligence or malpractice. The facts and circumstances in this case involve an incident that does not raise questions of medical judgment beyond a potential jury's common knowledge and experience. In the event that any of Plaintiff Trowell's claims are still deemed sounding in medical malpractice, the ordinary negligence claims must still proceed. Justice also requires that Plaintiff Trowell be given the right to amend her complaint to remedy any defects.

WHEREFORE the Plaintiff prays that this Honorable Court grant its Motion for Reconsideration and to Amend Complaint as brought herein, and grant any further relief deemed just and equitable.

Respectfully submitted,

CARLA D. AIKENS, P.C.

By: /s/ Carla D. Aikens
Carla D. Aikens, Esq. (P69530)
Attorney for Appellants
675 Lakeview Parkway #6062
Vernon Hills, IL 60061
(215) 219-7404
carla@aikenslawfirm.com

Date: April 29, 2015

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon all counsel of record on April 29, 2015 via e-filing.

I DECLARE THAT THE STATEMENT ABOVE IS TRUE TO THE BEST OF MY INFORMATION, KNOWLEDGE AND BELIEF.

/s/ Carla D. Aikens
Carla D. Aikens

EXHIBIT G

STATE OF MICHIGAN IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

TROWELL,AUDREY,, Plaintiff,

V

PROVIDENCE HOSPITAL & MEDICAL Defendant,

NO: 2014-141798-NO

HON. COLLEEN A. O'BRIEN

In the matter of:

ORDER REGARDING MOTION

Motion Title: **Plaintiff's motion for reconsideration.**

The above named motion is:

- ☐ granted.
- ☐ granted in part, denied in part.
- ☒ denied.
- ☐ for the reasons stated on the record.

In addition: There is no oral argument. MCR 2.119(F)(2). The Court finds that Plaintiff has failed to demonstrate palpable error and merely presents the same issues ruled on by the court, either expressly or by reasonable implication. MCR 2.119(F)(3).

DATED: 05/04/2015

/s/ Judge Colleen A. O'Brien

HON. COLLEEN A. O'BRIEN

Circuit Court Judge

MM

EXHIBIT H

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

TROWELL,AUDREY,,

Plaintiff,

V

PROVIDENCE HOSPITAL & MEDICAL

Defendant,

NO: 2014-141798-NO

HON. COLLEEN A. O'BRIEN

ORDER

At a session of Court
held in Oakland County, Michigan
on 05/04/2015

THE COURT FINDS:

Plaintiff has filed a motion to amend complaint. Plaintiff has not attached a proposed amended complaint that would allow this Court to give any meaningful review to the motion.

THEREFORE, THE COURT HEREBY ORDERS:

Plaintiff shall refile her motion to amend complaint attaching a proposed amended complaint. Plaintiff shall re-notice and re-praecipe her motion to amend compliant.

/s/ Judge Colleen A. O'Brien

HON. COLLEEN A. O'BRIEN

Circuit Court Judge

MM

EXHIBIT I

STATE OF MICHIGAN
CIRCUIT COURT FOR THE COUNTY OF OAKLAND

AUDREY TROWELL, Plaintiff, vs. PROVIDENCE HOSPITAL AND MEDICAL CENTERS, INC., a Michigan nonprofit corporation. Defendant	Case No.: 14-141798-NO HON. COLLEEN A. O'BRIEN

CARLA D. AIKENS (P69530) CARLA D. AIKENS, P.C. Attorney for Plaintiffs 675 Lakeview Parkway #6062 Vernon Hills, IL 60061 Phone: (215) 219-7404 Email: carla@aikenslawfirm.com	WILSON A. COPELAND, II (P23837) GRIER, COPELAND & WILLIAMS, P.C. Attorney for Defendant 615 Griswold Street, Suite 531 Detroit, Michigan 48226 Phone: (313) 961-2600 Email: wc2nd@gcwpc.com

PLAINTIFF'S MOTION TO AMEND COMPLAINT

NOW COMES Plaintiff, AUDREY TROWELL, by and through her attorneys, CARLA D. AIKENS, P.C., and for her Motion for Reconsideration and to Amend Complaint, states as follows:

1. Plaintiff filed this action on or about February 11, 2014, for negligence in connection with Defendant's treatment of Plaintiff on or about February 11, 2011.
2. Defendant filed a Motion for Partial Summary Disposition on January 9, 2015, which was granted by this court on April 8, 2015.
3. On April 28, 2015, Plaintiff filed a Motion for Reconsideration and to Amend Complaint.

FEE

4. On May 4, 2015, this Honorable Court entered two separate orders. One Order denied the Motion for Reconsideration; the second Order stated that Plaintiff should re-file and re-praecipe her motion as no proposed amended complaint was attached. See May 4, 2015 Order.

5. MCR 2.118(A)(2) provides that "...a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires."

6. Plaintiff has already filed the present matter against Defendant arising out of the negligent actions at Defendant hospital. Because the amended complaint arises from the same occurrence that is the subject of the present litigation, Plaintiff should be allowed to file the amended Complaint attached hereto as **Exhibit A**.

7. Because the Michigan Court Rules dictate that Plaintiff should be allowed to amend her complaint, and Plaintiff has done nothing that would justify not being allowed to amend her complaint, Plaintiff's request to amend the complaint should be granted.

WHEREFORE the Plaintiff prays that this Honorable Court grant her Motion to Amend Complaint as brought herein, and grant any further relief deemed just and equitable.

Respectfully submitted,
CARLA D. AIKENS, P.C.

By: /s/ Carla D. Aikens
Carla D. Aikens, Esq. (P69530)
Attorney for Appellants
675 Lakeview Parkway #6062
Vernon Hills, IL 60061
(215) 219-7404
carla@aikenslawfirm.com

Dated: May 8, 2015

STATE OF MICHIGAN
CIRCUIT COURT FOR THE COUNTY OF OAKLAND

AUDREY TROWELL, Plaintiff, vs. PROVIDENCE HOSPITAL AND MEDICAL CENTERS, INC., a Michigan nonprofit corporation. Defendant	Case No.: 14-141798-NO HON. COLLEEN A. O'BRIEN

CARLA D. AIKENS (P69530) CARLA D. AIKENS, P.C. Attorney for Plaintiffs 675 Lakeview Parkway #6062 Vernon Hills, IL 60061 Phone: (215) 219-7404 Email: carla@aikenslawfirm.com	WILSON A. COPELAND, II (P23837) GRIER, COPELAND & WILLIAMS, P.C. Attorney for Defendant 615 Griswold Street, Suite 531 Detroit, Michigan 48226 Phone: (313) 961-2600 Email: wc2nd@gcwpc.com

BRIEF IN SUPPORT OF PLAINTIFF'S MOTION TO AMEND COMPLAINT

I. STATEMENT OF FACTS

On February 11, 2011, Plaintiff Trowell was admitted to Providence Hospital in Southfield, Michigan for an aneurysm that caused a stroke. Plaintiff Trowell's stroke caused her to go into cardiac arrest and she was placed in the intensive care unit (ICU) in Defendant hospital.

During her hospitalization, Plaintiff Trowell was assisted by agents and employees of Defendant hospital. Despite Plaintiff Trowell having been advised that two nurses needed to assist her to the bathroom, on several occasions, Defendant only employed one nurse to assist her. On one occasion, Defendant's nurse (upon information and belief, referred to as "Dana" in Plaintiff's original Complaint; Defendant later advised Plaintiff's counsel that her name is

actually named Dana McCorkle) was tasked with assisting Plaintiff Trowell with using the bathroom. Although Dana McCorkle was tasked with assisting Plaintiff Trowell with using the bathroom, she dropped Plaintiff Trowell, which caused Plaintiff Trowell to hit her head on her wheelchair. Dana McCorkle attempted to assist Plaintiff Trowell again after dropping her, but instead she dropped Plaintiff Trowell a second time.

As a result of her falls, Plaintiff Trowell suffered a torn rotator cuff which has required multiple surgeries and treatment. Further, an MRI revealed that Plaintiff Trowell had suffered bleeding of the brain as a result of being dropped by Defendant's nurse, Dana McCorkle.

II. ARGUMENT

The Michigan Court of Appeals has held that "Medical professionals may be liable for ordinary negligence as well as for malpractice." MacDonald v. Barbarotto, 411 N.W.2d 747, 750, 161 Mich. App. 542 (Mich. App., 1987). See also Adkins v. Annapolis Hospital, 420 Mich. 87, 95, n. 10, 360 N.W.2d 150 (1984); Becker v. Meyer Rexall, Drug Co., 141 Mich. App. 481, 367 N.W.2d 424 (1985); and Nemzin v. Sinai Hospital, 143 Mich. App. 798, 804, 372 N.W.2d 667 (1985). In Bryant v. Oakpointe Villa Nursing Center, 684 N.W.2d 864, 471 Mich. 411 (2004) the Michigan Supreme Court held "The fact that an employee of a licensed health care facility was engaging in medical care at the time the alleged negligence occurred means that the plaintiff's claim may possibly sound in medical malpractice; it does not mean that the plaintiff's claim certainly sounds in medical malpractice." Id. at 871.

To distinguish medical malpractice claims from negligence claims, there are two questions that must be asked. The first is "whether the claim pertains to an action that occurred within the course of a professional relationship;" and the second is "whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience." Id. If

the answer is "yes" to both of these questions, then the action is considered medical malpractice. Id.

In the present case, Plaintiff Trowell's complaint alleged that Defendant hospital was negligent in the following ways:

a. Failure to ensure the safety of Plaintiff while in Defendant hospital;

b. Failure to properly supervise the care of Plaintiff while in Defendant's hospital;

c. Failure to provide an adequate number of nurses to assist Plaintiff while in Defendants hospital;

d. Failure to properly train Dana McCorkle and other nurses in how to properly handle patients such as Plaintiff;

e. Failure to exercise proper care to prevent Plaintiff from being injured while in Defendant's hospital.

These allegations sound in negligence, as opposed to medical malpractice. Applying the analysis in Bryant, the answer to the first question is not in dispute. The fall which Plaintiff Trowell suffered was within the course of a professional relationship. The answer to the second question must be answered in the negative, as the facts raise issues that are within the common knowledge of a jury and do not involve medical judgment.

A. Failure to Ensure Safety and Failure to Exercise Proper Care

Even if the Court was not inclined to find that Plaintiff's claims regarding supervision and training sound in ordinary negligence, Plaintiff's failure to ensure safety and exercise proper care as straightforward, ordinary negligence claims. In Bryant, Plaintiff also alleged that Defendant failed to take steps to protect plaintiff because Defendant had notice of the risk of asphyxiation and yet "Defendant did nothing to rectify it." The court held:

> This claim sounds in ordinary negligence. No expert testimony is necessary to determine whether defendant's employees should have taken some sort of corrective action to prevent future harm after learning of the hazard. The fact-finder can rely on common knowledge and experience in determining whether defendant ought to have made an attempt to reduce a known risk of imminent harm to one of its charges.
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> Bryant at 875.

The "failure to take steps" allegation in Bryant is similar to the "failure to take corrective action" allegation in Sawicki v. Katvinksy, No. 318818, Mich. App. (March 17, 2015). In this case, Plaintiff Sawicki sustained injuries after she fell from a raised toilet seat at Defendant hospital. Sawicki underwent knee replacement surgery and was being assisted by Katvinksy, a technical partner at the hospital. Id. at 1. Plaintiff testified that she yelled "Whoa!" once she sat down on the seat. Id. Katvinsky still left her alone despite being aware of the risks posed by the unsteady toilet seat and her risk of falling due to her physical condition. Id. The court held that "No expert testimony is necessary to show that the defendant acted negligently by failing to take any corrective action after learning of the problem . . . Accordingly, this claim does not involve medical judgment, nor does it require knowledge of the standards of care applicable to medical caregivers or knowledge of technical or scientific matters." Id. at 3 (citing Bryant at 876).

In McIver v. St. John Macomb Oakland Hospital, No. 303090, Mich. App. (October 2, 2012) Plaintiff, who suffered from multiple sclerosis and dementia, fell from a chair that had been placed on a wet floor in her hospital bathroom. Id. at 1. Because of her history of falling, the hospital utilized restraints, and before her fall, the staff noted her unsteadiness and confusion. Plaintiff brought a negligence action against the hospital. Id. at 1, 2. The court held:

> The narrow allegation that McIver was left alone in the bathroom after being seated on an unsafe chair placed on a wet floor sets forth a claim within the realm of a jury's common knowledge and experience. Laypersons are capable of understanding these simple facts. No expert testimony is necessary to establish that it is unreasonable to direct a patient to sit in an unstable chair located on a wet floor, particularly a patient suffering from dementia and unsteadiness. Nor do we detect any scientific or technical basis for expert testimony, given these

> allegations. Accordingly, McIver's negligence claim relating to her placement in the chair sounds in ordinary negligence.
>
> Id. at 5.

In the present case, Plaintiff Trowell alleged failure to exercise proper care and failure to ensure safety, both of which sound in ordinary negligence. The court's reasoning in Bryant, Sawicki, and McIver that no expert testimony was necessary to assess Defendant's negligence warrants application to the present case. For instance, just as the defendants in these three cases, nurse Dana McCorkle was aware or should have been aware of Plaintiff Trowell's physical condition, which may make her more susceptible to a fall. In these cases Defendants were aware of the Plaintiffs' vulnerabilities, and "either disregarded the risks or neglected to address them." McIver at 6. Secondly, nurse Dana McCorkle was also aware that Plaintiff required two nurses to assist her, yet still proceeded on her own. Lastly, after dropping her the first time, she did nothing to rectify her mistake, and thus dropped her a second time. For both falls, she was aware of all the aforementioned conditions and she failed to take the necessary steps to protect Plaintiff. In this case, ensuring that Plaintiff Trowell did not fall did not require any specialized or scientific knowledge, but rather commonsense; and in the words of the court in McIver, was a matter of "routine decision-making." Id.

B. Negligence Claims of Plaintiff's Complaint must be Preserved

Plaintiff Trowell's claims clearly sound in negligence. However, even if Plaintiff concedes that the failure to train claim sounds in medical malpractice, Plaintiff Trowell has viable claims that clearly sound in ordinary negligence, as previously demonstrated. Even if this court strikes some of the claims within Plaintiff Trowell's complaint, the court should allow Plaintiff to amend her complaint and proceed on those claim claims which sound in ordinary negligence. This type of bifurcation of the complaint has occurred in a number of cases.

For instance, in Bryant, the court determined that two of plaintiff's claims sounded in medical malpractice, one in strict liability, and the remaining in ordinary negligence. Even though plaintiff's medical malpractice claims were time-barred, the court allowed them to proceed, along with the ordinary negligence claim. Bryant at 877. In Sawicki, the Michigan Court of Appeals also preserved plaintiff's ordinary negligence claims, holding "Because. . . some of plaintiffs' claims sound in ordinary negligence, it does not fully constitute a claim sounding in medical malpractice and will survive despite the existence of the medical malpractice claims." Sawicki at page 6. See also McIver page 7.

Further, Plaintiff should also be allowed to proceed to trial on the merits of its clearly valid claims. The Michigan Supreme Court has stated:

> Our legal system is also committed to a countervailing policy favoring disposition litigation on the merits, see Hurt v. Cambridge, 21 Mich App 652; 176 NW2d 450 (1970), which will frequently be found to be overriding. Thus, appellate courts have often warned "that dismissal with prejudice is . . . to be applied only in extreme situations."
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> North v. Department of Mental Health, 427 Mich. 659, 662 (1986) (internal citation omitted).

C. Request to Amend Complaint

MCR 2.118(A)(2) provides that "...a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires." "Because a court should freely grant leave to amend a complaint when justice so requires, a motion to amend should ordinarily be denied only for particularized reasons." Wormsbacher v Philip R. Seaver Title C.o Inc., 284 Mich App 1, 8 (2009) (citing Miller v Chapman Contracting, 477 Mich 102, 105; 730 NW2d 462 (2007)). Motions to amend may be denied for reasons including "undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the defendant, or futility." Wormsbacher, 284 Mich App at 8.

In Sheridan v. West Bloomfield Nursing & Convalescent Center, Inc., No. 272205, Oakland Circuit Court (March 6, 2007), Plaintiff alleged that Defendants were negligent when two nurses dropped plaintiff while she was moved from her bed to a wheelchair using a "gait belt." The Michigan Court of Appeals held that the trial court erred in dismissing the claims in plaintiff's amended complaint, which mirrors the allegations in Plaintiff Trowell's amended complaint. The court went on to hold:

> Plaintiff is not challenging the decision to move the decedent from her bed, the decision to use a gait belt, or the manner in which the gait belt was fastened to her body. The sole issue is whether, having decided to use and having secured the gait belt, defendants acted reasonably when they failed to maintain a secure grip on plaintiff's decedent and dropped her or allowed her to fall on the floor. Resolution of this issue is within the common knowledge and experience of an ordinary juror and does not require expert testimony concerning the exercise of medical judgment.
>
> Id. at 2.

Here, Plaintiff Trowell has valid claims that negligence was committed by Defendant. Defendant's motion for summary disposition only cited subparagraphs b through e of Paragraph 15 as allegations that it claimed sounded in medical malpractice. See Defendant's Motion for Summary Disposition at 2. **Notably, Defendant never denied that Paragraph 15a sounded in ordinary negligence**. Plaintiff has amended her Complaint to include only Paragraph 15a, which does not change the gravamen of the original Complaint and makes clear that Plaintiff's claim sounds in ordinary negligence. The amended complaint would arise out of the same transaction and occurrence that is the subject of the present litigation. Further, Plaintiff Trowell has done nothing that should prevent her from being allowed to amend her Complaint. There has been no undue delay, bad faith or dilatory motive on the part of Plaintiff in seeking amendment. Further, if amendment were denied, Plaintiff would be time-barred from a separate claim.

III. CONCLUSION

In keeping with the aforementioned Michigan case law, medical professionals may be liable for ordinary negligence, and the ordinary negligence claims in Plaintiff's complaint must still proceed. Thus, Plaintiff respectfully requests that she be given the right to amend her complaint to remedy any defects rather than have her claim dismissed in its entirety, leaving her with no recourse for the harm caused by Defendant's nurse.

WHEREFORE the Plaintiff prays that this Honorable Court grant its Motion for Reconsideration and to Amend Complaint as brought herein, and grant any further relief deemed just and equitable.

Respectfully submitted,

CARLA D. AIKENS, P.C.

By: /s/ Carla D. Aikens
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Dated: May 8, 2015

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon all counsel of record on May 11, 2015 via e-filing.

I DECLARE THAT THE STATEMENT ABOVE IS TRUE TO THE BEST OF MY INFORMATION, KNOWLEDGE AND BELIEF.

Adrienne Uhl

Exhibit A

STATE OF MICHIGAN
CIRCUIT COURT FOR THE COUNTY OF OAKLAND

AUDREY TROWELL, Plaintiff, vs. PROVIDENCE HOSPITAL AND MEDICAL CENTERS, INC., a Michigan nonprofit corporation. Defendant	Case No.: [_____] Judge: [_____]

AMENDED COMPLAINT AND JURY DEMAND

Jury Demand

COMES NOW Plaintiff, and makes her demand for trial by jury hereunder.

/s/ Carla D. Aikens
Carla D. Aikens
Attorney for Plaintiff

Civil Action

No civil action was heretofore filed arising from this occurrence between these parties.

Complaint

1. Plaintiff is a resident of the City of Detroit, County of Wayne State of Michigan, and received medical care and treatment from Defendant.

2. Defendant is a Michigan nonprofit corporation located in Southfield, Michigan.

3. The amount in controversy together with interest, costs, and attorneys' fees is more than $25,000.00.

Count I –Negligence

4. Plaintiff incorporates by reference the above paragraphs.
5. On or about February 11, 2011, Plaintiff was admitted to Providence Hospital in Southfield, Michigan for an aneurysm that caused a stroke.
6. Plaintiff's stroke caused her to go into cardiac arrest, and she was placed in the intensive care unit ("ICU") in Defendant hospital to recover.
7. During her hospitalization, Plaintiff was assisted by agents and employees of Defendant hospital.
8. Defendant hospital had a duty to ensure that Plaintiff received proper assistance while a patient, including assistance ambulating to and from the bathroom while she was in the ICU.
9. Despite the fact that she had been advised that two nurses needed to assist Plaintiff to the bathroom, on several occasions, Defendant only employed one nurse to assist Plaintiff.
10. On one occasion, Defendant's nurse Dana McCorkle was tasked with assisting Plaintiff with using the bathroom.
11. Although Nurse McCorkle was tasked with assisting Plaintiff with using the bathroom, she dropped Plaintiff, which caused Plaintiff to hit her head on her wheelchair.

12. Nurse McCorkle attempted to assist Plaintiff again after dropping her, but instead she dropped Plaintiff a second time.

13. As a result of her falls, Plaintiff suffered a torn rotator cuff which has required multiple surgeries, and treatment continues into the present time.

14. Further, an MRI revealed that Plaintiff had suffered bleeding on the brain as a result of being dropped by Defendant's nurse.

15. Defendant hospital was negligent in one or more of the following particulars, departing from the standard of care in the community:

a. Failure to ensure the safety of Plaintiff while in Defendant's hospital;

16. Defendant hospital was negligent through its agents, employees, and staff in failing to ensure the safety of Plaintiff.

17. The negligence of Defendant and its agents, employees and staff was the proximate of Plaintiff's damages set forth below.

18. As a direct and proximate result of Defendants' negligence, Plaintiff suffered pain, disability, the loss of full use of her shoulder/arm area due to shooting pain, numbness and weakness, resulting in falls and injuries. Plaintiff has suffered noneconomic damages of $2,500,000. Her resulting conditions are permanent.

19. As a further direct and proximate result of Plaintiffs disability, she can no longer work and has lost wages and earning capacity for the remainder of her life. This sum will be provided by evidence adduced at or before trial.

20. To treat her medical conditions set forth above, Plaintiff has and will continue to incur reasonable and necessary medical, prescription and surgical expenses in a sum to be adduced at or before trial.

WHEREFORE, Plaintiff seeks judgment against Defendant as follows:

a. On account of her noneconomic damages in the sum of $2,500,000;

b. On account of her economic damages as outlined above, in sums to be provided at trial; and

c. On account of her costs and necessary disbursements incurred herein.

Respectfully Submitted,

/s/ Carla D. Aikens

Carla D. Aikens, P69530
Carla D. Aikens, P.C.
Attorneys for Plaintiff
P.O. Box 6062
Vernon Hills, IL 60061

Dated this _____ day of _____, 2015

EXHIBIT J

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

TROWELL,AUDREY,,

Plaintiff,

V

PROVIDENCE HOSPITAL & MEDICAL

Defendant,

NO: 2014-141798-NO

HON. COLLEEN A. O'BRIEN

ORDER

At a session of Court
held in Oakland County, Michigan
on 05/26/2015

THE COURT FINDS:

Plaintiff has filed a motion to amend complaint. The Court waives oral argument. MCR 2.119(E)(3). The Court has reviewed the motion and response. The Court finds that Plaintiff's motion is essentially a motion for reconsideration of Plaintiff's previously filed motion for reconsideration which was denied by the Court. Furthermore, as correctly pointed out by Defendant, the proposed amended complaint still sounds in medical malpractice. Therefore, Plaintiff's motion to amend the complaint would be futile.

THEREFORE, THE COURT HEREBY ORDERS:

Plaintiff's motion to amend complaint is DENIED.

/s/ Judge Colleen A. O'Brien

HON. COLLEEN A. O'BRIEN

Circuit Court Judge

KE

EXHIBIT K

RAYMOND SHERIDAN, Personal Representative of the Estate of EVELYN BROWN SHERIDAN, Deceased, Plaintiff-Appellant, v WEST BLOOMFIELD NURSING & CONVALESCENT CENTER, INC., BEAUMONT NURSING HOME SERVICES, INC., WEST BLOOMFIELD NURSING & CONVALESCENT CENTER JOINT VENTURE, DOREEN DAVIS and YOLANDA MATHEWS, Defendants-Appellees.

No. 272205

COURT OF APPEALS OF MICHIGAN

2007 Mich. App. LEXIS 613

March 6, 2007, Decided

NOTICE: [*1] THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

SUBSEQUENT HISTORY: Appeal denied by, Stay denied by *Sheridan v. W. Bloomfield Nursing & Convalescent Ctr., 2007 Mich. LEXIS 1569 (Mich., July 9, 2007)*

JUDGES: Before: Hoekstra, P.J., and Markey and Wilder, JJ.

OPINION

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendants' motion for summary disposition. We reverse and remand. This appeal is being decided without oral argument pursuant to *MCR 7.214(E)*.

The trial court's ruling on a motion for summary disposition is reviewed de novo. *Kefgen v Davidson, 241 Mich. App. 611, 616; 617 N.W.2d 351 (2000)*. The dispositive issue in this case is whether plaintiff's claims are for ordinary negligence or medical malpractice. The determination "whether the nature of a claim is ordinary negligence or medical malpractice" is also reviewed de novo. *Bryant v Oakpointe Villa Nursing Centre, Inc, 471 Mich. 411, 419; 684 N.W.2d 864 (2004)*.

As noted by the Court in *Bryant, supra at 422*:

> a court must ask two fundamental questions in determining [*2] whether a claim sounds in ordinary negligence or medical malpractice: (1) whether the claim pertains to an action that occurred within the course of a professional relationship; and (2) whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience. If both these questions are answered in the affirmative, the action is subject to the procedural and substantive requirements that govern medical malpractice actions.

The first question is not at issue here. It is undisputed that the conduct in question occurred within the course of a professional relationship. The answer to the second question "depends on whether the facts allegedly raise issues that are within the common knowledge and experience of the jury or, alternatively, raise questions involving medical judgment." *Dorris v Detroit Osteopathic Hosp Corp, 460 Mich. 26, 46; 594 N.W.2d 455 (1999)*.

> If the reasonableness of the health care professionals' action can be evaluated by lay jurors, on the basis of their common knowledge and experience, it is ordinary negligence. If, on the other hand, the reasonableness of the action can be evaluated by **[*3]** a jury only after having been presented the standards of care pertaining to the medical issue before the jury explained by experts, a medical malpractice claim is involved. [*Bryant, supra at 423.*]
>
> Injuries that occur while a patient is being moved may or may not implicate professional judgment. The court must examine the particular factual setting of the plaintiff's claim in order to determine whether the circumstances - for example, the medical condition of the plaintiff or the sophistication required to safely effect the move - implicate medical judgment as explained in *Dorris*. [*Id. at 421 n 9.*]

We conclude that the trial court erred in dismissing the claims alleged in plaintiff's amended complaint. Those claims alleged that defendants were negligent when two nurse assistants dropped plaintiff's decedent while moving her from her bed to a wheelchair using a "gait belt." Plaintiff is not challenging the decision to move the decedent from her bed, the decision to use a gait belt, or the manner in which the gait belt was fastened to her body. The sole issue is whether, having decided to use and having secured the gait belt, **[*4]** defendants acted reasonably when they failed to maintain a secure grip on plaintiff's decedent and dropped her or allowed her to fall on the floor. Resolution of this issue is within the common knowledge and experience of an ordinary juror and does not require expert testimony concerning the exercise of medical judgment. *Gold v Sinai Hosp of Detroit, Inc, 5 Mich. App. 368; 146 N.W.2d 723 (1966); Fogel v Sinai Hosp of Detroit, 2 Mich. App. 99; 138 N.W.2d 503 (1965).*

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra

/s/ Jane E. Markey

/s/ Kurtis T. Wilder

EXHIBIT L

2 of 2 DOCUMENTS

LEONORA MCIVER, Plaintiff-Appellant, v ST. JOHN MACOMB OAKLAND HOSPITAL, Defendant-Appellee.

No. 303090

COURT OF APPEALS OF MICHIGAN

2012 Mich. App. LEXIS 1895

October 2, 2012, Decided

NOTICE: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

PRIOR HISTORY: [*1]
Oakland Circuit Court. LC No. 2010-111263-NO.

JUDGES: Before: GLEICHER, P.J., and M. J. KELLY and BOONSTRA, JJ. GLEICHER, P. J., (concurring). BOONSTRA, J., (concurring in part and dissenting in part).

OPINION

PER CURIAM.

Plaintiff Leonora McIver fell while hospitalized at defendant St. John Macomb Oakland Hospital and was injured. She brought an action against the hospital asserting negligence and breach of contract claims. The circuit court granted summary disposition to defendant, finding that McIver's allegations sounded in professional rather than ordinary negligence. The circuit court ruled that because McIver failed to follow the notice and pleading requirements applicable in medical malpractice actions, her complaint failed to toll the applicable statute of limitations, which had expired.[1] We affirm the circuit court's dismissal of McIver's breach of contract claim and those portions of her negligence claim sounding in professional malpractice, reverse the dismissal of the single ordinary negligence claim set forth in the complaint, and remand for further proceedings.

1 The circuit court also summarily dismissed McIver's breach of contract claim. McIver does not challenge that ruling on appeal **[*2]** and therefore has abandoned it. *Begin v Mich Bell Tel Co, 284 Mich App 581, 590; 773 NW2d 271 (2009).*

I. BACKGROUND

Leonora McIver suffers from multiple sclerosis and dementia. On March 13, 2008, she lost consciousness at her physician's office and was admitted to defendant hospital. According to hospital records, McIver displayed episodic confusion and unsteadiness on her feet. To reduce her risk of falling, her physicians signed "acute safety restraint" orders. Nursing notes for March 18 through March 23 describe that, despite the presence of restraints, McIver repeatedly attempted to get out of bed unassisted. A nurse characterized a "lap belt" restraint as "not effective" at keeping McIver in her bed.

On March 19, a nurse noted that McIver "continues with intermittent confusion; impulsive when confused; unsteady gait." At 5:00 p.m. that day, a nurse charted that McIver "attempted to get out of bed more than 15 [times] this shift." On March 20, a nurse documented: "[patient] still with episodic impulsive behaviors, at risk [for] falls [secondary to] weakness, MS." Another note written that day states, "Patient still takes mittens [and] lapbelt out [sic] several times. Gets out of bed **[*3]** [and] asking for assistance." On March 21 and 22, a "sitter" was posted at McIver's bedside pursuant to a physician's written order. A nurse noted that, in addition to the sitter, "fall/safety precautions [were] maintained."

On March 23, a physician discontinued the sitter's services. According to a nursing note, the sitter departed

at approximately 10:30 a.m. The entry states in its entirety: "Sitter [discontinued]. [Patient] up to [bathroom]. Instructed [patient] to call for assist to get [out of bed]." McIver's complaint avers that she later fell from a chair that had been placed on a wet floor in front of the sink in her hospital bathroom.

McIver's complaint sets forth the following pertinent allegations:

> 9. Defendant assigned an employee to act as a "sitter", a non-medical task of being present to assist Plaintiff in any normal daily activities while at the hospital.
>
> 10. On or about March 23, 2008, Plaintiff was in her hospital room and there was no sitter despite her need to bathe herself, but being unable to stand, she rang for assistance.
>
> 11. An employee of defendant placed a chair in the bathroom, in front of the sink, and left Plaintiff unattended to sit in the chair.
>
> 12. Plaintiff **[*4]** started to sit down when the chair flipped over throwing Plaintiff to the floor.
>
> * * *
>
> 16. Defendant owed Plaintiff certain general and specific duties, including, but not limited to:
>
> A) Duty to exercise reasonable and ordinary care for the Plaintiff's safety as the Plaintiff's known condition required;
>
> B) Duty to maintain premises in a reasonably safe manner;
>
> C) Duty to warn of unsafe conditions, including wet floors;
>
> D) Duty to adequately assist Plaintiff with basic needs;
>
> E) Duty to adequately supervise Plaintiff;
>
> F) Duty to furnish hospital room with safe and approved furniture, including chairs with non-slip contact surfaces with the floor[.]
>
> 17. Plaintiff's fall and injuries were proximately caused by the carelessness and negligence of Defendant, or agents of Defendant, in the breach of aforesaid duties owed to Plaintiff by Defendant when leaving Plaintiff unattended to sit down in a chair on a wet floor in the bathroom under the exclusive control of Defendant.
>
> ***
>
> 23. Defendant failed, refused and neglected to provide adequate, safe, and proper care and facilities in that Defendant created an unsafe condition from its maintenance schedule and use of chairs that place patients at risk of **[*5]** injury and in not assisting and supervising Plaintiff during bathing.

Defendant moved for summary disposition pursuant to *MCR 2.116(C)(7)* and *(8)*, contending that McIver's allegations sounded in medical malpractice rather than ordinary negligence. In support of its motion, defendant submitted an affidavit signed by a registered nurse averring that decisions concerning restraint precautions, the need for sitters and the content of fall risk evaluations entail professional judgments outside the realm of common knowledge and experience. However, defendant submitted no evidence describing the circumstances of McIver's fall, or challenging McIver's contention that she fell after having been seated in an unsafe chair placed on a wet floor. The circuit court granted defendant's motion in a bench ruling, finding that "medical judgment comes into play in [sic] concerning how the plaintiff was assessed, treated, and provided a safe environment."

II. ANALYSIS

McIver disputes the circuit court's determination that her claims sound in professional rather than ordinary negligence. This Court reviews de novo a circuit court's summary disposition ruling. *Walsh v Taylor, 263 Mich App 618, 621; 689 NW2d 506 (2004).* **[*6]** Whether a claim sounds in ordinary negligence or medical malpractice presents a question of law subject to de novo review pursuant to *MCR 2.116(C)(7). Bryant v Oakpointe Villa Nursing Ctr, Inc, 471 Mich 411, 419; 684 NW2d 864 (2004).* "In making a decision under *MCR 2.116(C)(7)*, we consider all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict it." *Id.*

At the summary disposition hearing, defendant's counsel argued:

> And finally, Mr. Halpern has thrown into his Complaint -- I'm not sure what the basis for this is, kind of a throwaway al-

> legation about a wet floor, and a -- something about a chair slipping. I do -- we deposed the plaintiff. She has no memory of anything that happened that day. We've deposed her husband. Nothing in either deposition brought up any issue at all about a wet floor, any issue at all about an improper chair. And I have to think that these are just red herrings.[2]

Despite counsel's belief that the chair allegation constituted a "red herring," defendant produced no evidence contradicting the facts set forth in the complaint. Neither McIver's deposition [*7] testimony nor her husband's appear in the circuit court record. In the absence of any documentary evidence challenging the facts alleged in the complaint, we must accept them as true. *Bryant, 471 Mich at 419*.

> 2 The dissent contends that by recognizing in McIver's complaint an allegation that she fell from a chair that slipped on a wet floor we have "craft[ed] for plaintiff a claim that is not even alleged in her complaint." *Post* at 4. We respectfully submit that we have read the complaint to mean precisely what it says, as did defense counsel. Specifically, paragraph 23 states that "Defendant failed, refused and neglected to provide adequate, safe, and proper care and facilities in that Defendant created an unsafe condition from its maintenance schedule and use of chairs that place patients at risk of injury and in not assisting and supervising Plaintiff during bathing." Moreover, we have accepted the complaint's factual allegations as true and have construed them in the light most favorable to McIver, as we must do under *MCR 2.116(C)(7). Dextrom v Wexford Co, 287 Mich App 406, 428; 789 NW2d 211 (2010).* Indisputably, the complaint alleges that McIver "was thrown from a chair" placed [*8] on a wet floor, and that defendant owed a duty to "furnish hospital room[s] with safe and approved furniture, including chairs with non-slip contact surfaces with the floor[.]" Whether McIver can support her claim related to the chair remains to be tested in a properly-supported summary disposition motion.

Defense counsel's disclaimer of the chair allegation does not qualify as substantively admissible evidence, and does not suffice to place in dispute the manner of McIver's fall. In *Maiden v Rozwood, 461 Mich 109, 119; 597 NW2d 817 (1999)*, the Supreme Court emphasized that while "a movant under *MCR 2.116(C)(7)* is not required to file supportive material, and the opposing party need not reply with supportive material," a party "may support a motion under *MCR 2.116(C)(7)* by affidavits, depositions, admissions, or other documentary evidence," as long as "the substance or content of the supporting proofs [is] admissible in evidence." Defendant's failure to challenge with substantively admissible evidence the specific allegations describing McIver's fall require us to regard those allegations as true. *Id.*

In *Bryant, 471 Mich at 422*, the Supreme Court set forth the two "defining characteristics" [*9] of a medical malpractice clam:

> First, medical malpractice can occur only "'within the course of a professional relationship.'" [*Dorris v Detroit Osteopathic Hosp Corp, 460 Mich 26, 45; 594 NW2d 455 (1999)* (citation omitted)]. Second, claims of medical malpractice necessarily "raise questions involving medical judgment." *Id. at 46.* Claims of ordinary negligence, by contrast, "raise issues that are within the common knowledge and experience of the [fact-finder]." *Id.* Therefore, a court must ask two fundamental questions in determining whether a claim sounds in ordinary negligence or medical malpractice: (1) whether the claim pertains to an action that occurred within the course of a professional relationship; and (2) whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience. If both these questions are answered in the affirmative, the action is subject to the procedural and substantive requirements that govern medical malpractice actions.

The parties agree that McIver's claims arose within the course of a professional relationship. Regarding *Bryant's* second prong, McIver asserts that because her history of falling was well-known and "there [*10] is nothing whatsoever sophisticated, complicated or technical, or . . . medically or scientifically-based" about her case, she alleged only ordinary negligence.

Bryant's second inquiry directs us to examine "whether the claim raises questions of medical judgment requiring expert testimony or, on the other hand, whether it alleges facts within the realm of a jury's common knowledge and experience." *Id. at 423*. If lay jurors are capable of drawing upon common knowledge and experience to evaluate whether a healthcare professional acted reasonably, the claim is for ordinary negligence.

"If, on the other hand, the reasonableness of the action can be evaluated by a jury only after having been presented the standards of care pertaining to the medical issue before the jury explained by experts, a medical malpractice claim is involved." *Id.*

The narrow allegation that McIver was left alone in the bathroom after being seated on an unsafe chair placed on a wet floor sets forth a claim within the realm of a jury's common knowledge and experience. Laypersons are capable of understanding these simple facts. No expert testimony is necessary to establish that it is unreasonable to direct a patient to **[*11]** sit in an unstable chair located on a wet floor, particularly a patient suffering from dementia and unsteadiness. Nor do we detect any scientific or technical basis for expert testimony, given these allegations. Accordingly, McIver's negligence claim relating to her placement in the chair sounds in ordinary negligence. The balance of her other negligence claims, however, sound in medical malpractice and the circuit court properly dismissed them.

The facts presented in *Bryant* and in the hypothetical case described in *Bryant* guide our analysis. Catherine Hunt, the plaintiff in *Bryant,* suffered from multi-infarct dementia and diabetes, had suffered several strokes, and required twenty-four-hour-a-day nursing home care for all her needs. *Bryant, 471 Mich at 415.* Hunt's physician authorized the staff of the nursing home to employ "various physical restraints" including wedges or bumper pads preventing the plaintiff from "entangling herself in . . . the rails" of her bed. *Id. at 415-416.* On the day before the event giving rise to Hunt's claim, nursing assistants observed that Hunt "was lying in her bed very close to the bed rails and was tangled in her restraining vest, gown, and bed sheets." **[*12]** *Id. at 416.* They untangled her and informed their supervisor that the wedges authorized by Hunt's physician afforded inadequate protection. *Id.* "The next day, . . . Hunt slipped between the rails of her bed and was in large part out of the bed with the lower half of her body on the floor but her head and neck under the bed side rail and her neck wedged in the gap between the rail and the mattress, thus preventing her from breathing." *Id. at 417.* Hunt died due to positional asphyxia. *Id.*

Hunt's complaint alleged that defendant "[n]egligently and recklessly fail[ed] to take steps to protect [her] when she was, in fact, discovered . . . entangled between the bed rails and the mattress." *Id. at 418.* The Supreme Court determined that this claim sounded in ordinary negligence:

> No expert testimony is necessary to determine whether defendant's employees should have taken *some* sort of corrective action to prevent future harm after learning of the hazard. The fact-finder can rely on common knowledge and experience in determining whether defendant ought to have made an attempt to reduce a known risk of imminent harm to one of its charges. [*Id. at 430-431*(emphasis in original).]

After setting forth **[*13]** this analysis, the Supreme Court proposed that the following hypothetical facts also implicate ordinary rather than professional negligence:

> Suppose, for example, that two CENAs [Certified Evaluated Nursing Assistants] employed by defendant discovered that a resident had slid underwater while taking a bath. Realizing that the resident might drown, the CENAs lift him above the water. They recognize that the resident's medical condition is such that he is likely to slide underwater again and, accordingly, they notify a nurse of the problem. The nurse, then, does nothing at all to rectify the problem, and the resident drowns while taking a bath the next day. [*Id. at 431*].

The Supreme Court explained, "No expert testimony is necessary to show that the defendant acted negligently by failing to take any corrective action after learning of the problem. A factfinder relying on common knowledge and experience can readily determine whether the defendant's response was sufficient." *Id. at 431.*

In *Bryant* and the hypothetical case described by the *Bryant* majority, the patients presented readily-identifiable risks of specific injury. Both scenarios involve hospital personnel who became aware of the **[*14]** patients' vulnerabilities to injury and either disregarded the risks or neglected to address them. In both factual settings, the allegedly deficient care involved nonmedical, routine decision-making. The circumstances in both cases required common-sense actions: notifying a physician of the need for more effective bed restraints, and maintaining hands-on supervision of a bathing patient.

Accepting as true the allegations in McIver's complaint, the immediate circumstances alleged to have attended McIver's fall bear important similarities to those described in *Bryant.* As in *Bryant* and *Bryant's* hypothetical scenario, McIver's care providers were aware of vulnerabilities that exposed her to an imminent risk of harm. Despite their knowledge that McIver suffered from

debilitation and dementia and had a history of falls, hospital personnel allegedly left her unattended on a chair situated on a wet floor. This decision clearly was not a *professional* one; rather, it involved an ordinary action in surroundings that a layperson can readily understand. If proven, these facts require no expert explanation because lay jurors can evaluate the reasonableness of the allegedly negligent acts by employing **[*15]** their common knowledge and experience.

On the other hand, the remaining allegations in McIver's complaint state professional negligence claims, and the circuit court properly dismissed them. "[M]edical judgment is implicated in determining whether safeguards against a fall should have been implemented and in determining the extent of those safeguards . . . ." *Sturgis Bank & Trust Co v Hillsdale Community Health Ctr, 268 Mich App 484, 489; 708 NW2d 453 (2005)*. In Sturgis, this Court relied on deposition testimony from "various nurses" explaining that "a nursing background and nursing experience are at least somewhat necessary to render a risk assessment and to make a determination regarding which safety or monitoring precautions to utilize when faced with a patient who is at risk of falling." *Id. at 498*. Here, the affidavit filed by defendant similarly supports that nursing assessments and the selection of fall precautions require professional judgments. Whether or not a sitter's services are necessary also constitutes a professional judgment. Thus, McIver is limited to proving that she fell in the manner set forth in the complaint, and that defendant's personnel unreasonably allowed **[*16]** her to remain unattended after seating her in an unstable chair located on a wet floor.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher

/s/ Michael J. Kelly

CONCUR BY: Elizabeth L. Gleicher; Mark T. Boonstra (In Part)

CONCUR

GLEICHER, P. J., (*concurring*).

I fully concur with the majority opinion. I write separately to respectfully respond to the arguments advanced by the dissent.

The dissent posits that because McIver's "ordinary negligence claim remains inextricably tied to an assessment of plaintiff's underlying medical condition" it "necessarily raises 'questions of medical judgment requiring expert testimony . . .' and therefore sounds exclusively in medical malpractice." *Post* at 7, quoting *Bryant v Oakpointe Villa Nursing Ctr, Inc, 471 Mich 411, 423; 684 NW2d 864 (2004)*. According to the dissent, expert testimony is required to prove that a patient in McIver's condition should not have been seated in a chair placed on the wet floor of a hospital bathroom, and left there unattended. *Post* at 7.

In my view, the dissent has conflated a care provider's *observation* of a patient's condition with a medical **[*17]** *diagnosis*. In so doing, the dissent distorts *Bryant's* holding. In *Bryant*, the Supreme Court specifically acknowledged the several medical diagnoses (multi-infarct dementia, diabetes, and strokes) that caused Catherine Hunt's debility. *Bryant, 471 Mich at 415*. The Court pointed out that as a result of those conditions, Hunt "had no control over her locomotive skills" and "various physical restraints" were needed to prevent her from becoming entangled in the bed rails. *Id. at 415-416*. Nursing home personnel observed that Hunt had become entangled in the restraining devices, but did not intervene to rectify the problem. *Id. at 430*. Regardless of the medical origins of Hunt's debility, her limitations were obvious to her care providers. The Supreme Court held that the nursing home's failure to act upon its agents' awareness of "a known risk of imminent harm" supported a claim sounding in ordinary negligence. *Id. at 430-431*. The "known risk of imminent harm" derived from Hunt's obvious inability to disentangle herself from her restraints rather than any evaluation flowing from knowledge of her actual diagnoses.

The diagnoses of Catherine Hunt's "underlying medical condition" played no role **[*18]** in the *Bryant* Court's determination that her care providers were potentially negligent. Nursing home personnel had no need to understand Hunt's diagnoses because it was obvious that she was unable to remove herself from tangled restraints. In other words, Hunt's care providers knew or should have known of Hunt's peril based on their observations, not because they should have extrapolated harm from her multi-infarct dementia, diabetes, and strokes. Similarly, knowledge of McIver's medical diagnoses bears no relevance to whether she should have been seated on a chair placed on a wet floor.

McIver alleges that she suffered from "severe debility" and her medical records bear out that claim. The nursing notes recorded during McIver's hospitalization document her "weakness," "confusion," and her "unsteady gait." These are not diagnoses; they are observable facts. If McIver's "severe debility" was apparent to her care providers, a jury evaluating McIver's claim would have no need to understand the technical medical reasons for her condition to conclude that she should not have been seated in the chair. Alternatively, if the testimony establishes that McIver appeared hale and hearty, a jury **[*19]** could reasonably decline to find that seating

her in the chair constituted negligence. As in the hypothetical scenario sketched out in *Bryant*, if the care providers "recognize that the [patient's] medical condition is such that" she is likely to fall from a chair placed on a wet floor, the case implicates ordinary negligence. *Id. at 431*. Contrary to the dissent, the details of McIver's underlying medical condition are simply irrelevant to her chair-related claim.

The dissent similarly errs by injecting notice into the analysis of whether a claim sounds in ordinary or professional negligence. The dissent asserts (with no evidentiary support) that because "there was no notice of any hazard, no known risk of imminent harm," this case is distinguishable from *Bryant*. *Post* at 9. The dissent misconstrues the legal issue presented here: whether McIver's complaint sets forth an ordinary negligence claim. Notice of McIver's physical condition and the risk of putting her in the chair will inform the jury's determination of whether hospital personnel behaved reasonably. In this sense, notice is a necessary component of McIver's negligence claim. But "notice" of McIver's condition has nothing to **[*20]** do with whether the complaint "raise[s] issues that are within the common knowledge and experience" of the factfinder. *Bryant, 471 Mich at 422*. The answer to that question flows from the nature of the allegations, not the proofs. "Notice" simply does not distinguish a professional liability claim from an ordinary negligence case.

More fundamentally, the dissent misapprehends the definition of negligence. The dissent asserts that here, unlike in *Bryant*, there was "no *failure* to take any corrective action." *Post* at 9 (emphasis added). The dissent continues: "Unlike the narrow exception of *Bryant*, plaintiff here is asking this Court to evaluate the propriety of the extent of the safety measures taken . . . not the complete *lack of action* taken by defendant in the face of a known risk." *Id.* (emphasis added). By suggesting that *Bryant's* holding concerns only cases alleging a "failure to take corrective action" the dissent misreads that case and disregards elementary tort principles.

Jurors in a negligence case are routinely instructed: "Negligence is the failure to use ordinary care. Ordinary care means the care a reasonably careful person would use." M Civ JI 10.02. This jury instruction **[*21]** continues: "Therefore, by 'negligence,' I mean the failure to do something that a reasonably careful person would do, or the doing of something that a reasonably careful person would not do, under the circumstances that you find existed in this case." By definition, negligence may arise from either failing to act, or from engaging in an unreasonable act. The dissent improperly reads into *Bryant* the requirement that to qualify as ordinary negligence, a defendant's conduct must involve a failure to act. Nothing in *Bryant* suggests that only one variety of negligence is actionable, and logically this proposition is unsupportable. See *Loweke v Ann Arbor Ceiling & Partition Co, LLC, 489 Mich 157, 170-171; 809 NW2d 553 (2011)* (citation omitted) ("[T]he 'simple idea that is embedded deep within the American common law of torts' [provides that] if one 'having assumed to act, does so negligently,' then liability exists as to a third party for 'failure of the defendant to exercise care and skill in the performance itself.'"). For example, had a nurse's aide spilled boiling water on McIver, or dropped a heavy mug on her head, the claim would involve ordinary negligence having nothing to do with **[*22]** a failure to take corrective action. Alternatively, had the aide instructed McIver (or any other patient) to walk barefoot to the bathroom across a slippery floor, the ordinary negligence claim would arise from "the doing of something that a reasonably careful person would not do," and would be actionable despite, unlike *Bryant*, that it flowed from an action rather than a failure to act.

Here, the complaint avers that defendant's employee seated McIver in an unsafe place. The chair may have been unsafe because it lacked anti-skid contact surfaces, or it may have simply been located on a wet floor. The dissent contends that jurors are unable to understand these simple facts without help from an expert, but has posited no explanation of what an expert might say. Neither nursing nor medical standards of care shed light on whether hospital personnel should seat a debilitated patient in an unsafe chair placed on a wet floor. A jury's common knowledge about chairs, wet floors, and debilitated persons suffices to evaluate the reasonableness of the hospital's alleged actions. Accordingly, the majority correctly concludes that the circuit court should not have summarily dismissed McIver's chair-related **[*23]** claim.

/s/ Elizabeth L. Gleicher

DISSENT BY: Mark T. Boonstra (In Part)

DISSENT

BOONSTRA, J., (*concurring in part and dissenting in part*).

I concur in that portion of the majority's opinion that affirms the circuit court's dismissal of plaintiff's breach of contract claim and portions (although unidentified) of her negligence claim. In my view, however, the entirety of plaintiff's negligence claim sounds in professional malpractice, and I therefore would find that the trial court properly dismissed plaintiff's negligence claim in its entirety. Accordingly, I respectfully dissent from the majority's reversal of the circuit court's dismissal "of the single ordinary negligence claim set forth in the complaint," and in its remand for further proceedings.

Acknowledging that plaintiff's claims arose in the course of a professional relationship, the majority properly cites to *Bryant v Oakpointe Villa Nursing Ctr, Inc, 471 Mich 411, 419; 684 NW2d 864 (2004)*, as raising a second level of inquiry, i.e., "whether the claim raises questions of medical judgment requiring expert testimony or, on the other hand, whether it alleges facts within the realm of a jury's common knowledge and experience." *Id. at 423*. If the former, **[*24]** the claims sounds in medical malpractice; if the latter, it sounds in ordinary negligence.

Where the majority errs, in my view, is in parsing plaintiff's negligence claim into supposedly severable components. Specifically, the majority concludes:

> The narrow allegation that McIver was left alone in the bathroom after being seated on an unsafe chair placed on a wet floor sets forth a claim within the realm of a jury's common knowledge and experience. Laypersons are capable of understanding these simple facts. No expert testimony is necessary to establish that it is unreasonable to direct a patient to sit in an unstable chair located on a wet floor, particularly a patient suffering from dementia and unsteadiness. Nor do we detect any scientific or technical basis for expert testimony, given these allegations. Accordingly, McIver's negligence claim relating to her placement in the chair sounds in ordinary negligence. The balance of her other negligence claims, however, sound in medical malpractice and the circuit court properly dismissed them. [*Ante* at .]

It is important to evaluate this conclusion of the majority in the context of both plaintiff's complaint and plaintiff's appeal. It **[*25]** is well-settled that, when evaluating whether a claim sounds in ordinary negligence or in medical malpractice, we must disregard the label a plaintiff has applied to her claims and consider the gravamen of the action by reading the claim *as a whole. Kuznar v Raksha Corp, 272 Mich App 130, 134; 724 NW2d 493 (2006)*, aff'd *481 Mich 169 (2008)* (emphasis added). The entire text of the "ordinary negligence" claim set forth in plaintiff's complaint reads as follows:

General Allegations 5. Plaintiff incorporates by reference, all prior allegations, as though set forth herein.[1]

6. Plaintiff suffers from multiple sclerosis, and, from time to time, has required hospitalization for manifesting conditions, involving fainting and episodes of unresponsiveness.

7. On or about March 13, 2008, Plaintiff was presented to St. John Macomb-Oakland Hospital, Oakland Center, having been found on the floor, unresponsive, in the waiting room of her physician, and was admitted for treatment being placed on a mechanical ventilator.

8. Defendant was familiar with Plaintiff, noting that "She is well-known to us from previous admissions and has multiple sclerosis with severe debility on that basis and history of a seizure **[*26]** disorder."

9. Defendant assigned an employee to act as a "sitter", a nonmedical task of being present to assist Plaintiff in any normal daily activities while at the hospital.

10. On or about March 23, 2008, Plaintiff was in her hospital room and there was no sitter despite her need to bathe herself, but being unable to stand, she rang for assistance.

11. An employee of Defendant placed a chair in the bathroom, in front of the sink, and left Plaintiff unattended to sit in the chair.

12. Plaintiff started to sit down when the chair flipped over throwing Plaintiff to the floor.

13. Plaintiff awakened on the floor with a deep laceration to her left forehead necessitating several stitches and producing considerable pain, discomfort and permanent scarring.

COUNT I

(Negligence)

14. Plaintiff incorporates by reference, all prior allegations, as though set forth herein.

15. On March 23, 2008, Plaintiff was a patient at Defendant's facility, a hospital operating under licensure from the State of Michigan when she was thrown from a chair, striking her head, cutting her forehead and suffering from temporary and permanent injuries.

16. Defendant owed Plaintiff certain general and specific duties, including, [*27] but not limited to:

> A) Duty to exercise reasonable and ordinary care for the Plaintiff's safety as the Plaintiff's known condition required;
>
> B) Duty to maintain premises in a reasonably safe manner;
>
> C) Duty to warn of unsafe conditions, including wet floors;
>
> D) Duty to adequately assist Plaintiff with basic needs;
>
> E) Duty to adequately supervise Plaintiff;
>
> F) Duty to furnish hospital room with safe and approved furniture, including chairs with non-slip contact surfaces with the floor;

17. Plaintiff's fall and injuries were proximately caused by the carelessness and negligence of Defendant, or agents of Defendant, in the breach of aforesaid duties owed to Plaintiff by Defendant when leaving Plaintiff unattended to sit down in a chair on a wet floor in the bathroom under the exclusive control of Defendant.

18. As a direct and proximate result of the negligence of Defendant as set forth above, Plaintiff was caused to sustain substantial bodily harm, permanent scarring, pain and suffering, has incurred substantial doctor and medical bills, and will be prevented from attending to her daily activities now and in the future, and will be compelled to expend large sums of money for additional medical [*28] and nursing care, all to Plaintiff's damage in a sum in excess of $250,000.00.

WHEREFORE, Plaintiff requests judgment against Defendant for damages, together with attorney fees and costs of suit, and such other and further relief as the court may deem proper.

1 The incorporated preliminary allegations merely identify the parties and establish jurisdiction.

Given that these are the totality of plaintiff's negligence allegations, the majority errs, in my opinion, in crafting for plaintiff a claim that is not even alleged in her complaint. Plaintiff's negligence claim makes no allegation, in fact, of any "unsafe chair," but only of "a chair." Moreover, it makes no direct factual allegation of a wet floor, but only raises the specter of a supposedly "wet" floor in describing her allegations as to "duty" and "proximate cause." The majority's assertion that "McIver's complaint avers that she later fell from a chair that had been placed on a wet floor in front of the sink in her hospital bathroom," is simply incorrect.[2]

2 The majority also errs in citing to paragraph 23 of plaintiff's complaint as somehow "pertinent" to plaintiff's negligence claim. *Ante* at and n 2. That paragraph, which [*29] indeed alleges that "Defendant created an unsafe condition from its maintenance schedule and use of chairs that place patients at risk of injury and in not assisting and supervising Plaintiff during bathing," is found nowhere in plaintiff's "negligence" count, but rather appears in plaintiff's "breach of contract" count, which the majority agrees was properly dismissed. Since plaintiff has not challenged on her appeal the dismissal of her contract claim, that claim has been abandoned. *Ante* at n 1, citing *Begin v Mich Bell Tel Co, 284 Mich App 581, 590; 773 NW2d 271 (2009).* Regardless, however, paragraph 23 is in no way "pertinent" to the negligence claim, and in any event, it also contains no allegation of an "unsafe" chair or a "wet floor."

A review of plaintiff's complaint further reveals that plaintiff's negligence claim is inextricably premised upon defendant having been placed on notice that plaintiff suffered from multiple sclerosis, a condition that sometimes manifested itself by "fainting and episodes of un-

responsiveness." Plaintiff makes no effort in her complaint to establish an ordinary negligence claim independent of her underlying medical condition; to the contrary, **[*30]** plaintiff's negligence claim is expressly and entirely based upon, and interwoven with, her underlying medical condition. Similarly, plaintiff's argument on appeal is not that she could prove ordinary negligence without reference to her underlying medical condition; rather, plaintiff argues that defendant was negligent *because* it was aware of her underlying medical condition. Plaintiff thus frames the question before this Court on appeal as follows:

> I. WHETHER WHERE HOSPITAL STAFF IS [sic] MADE AWARE OF PRIOR RECENT INCIDENTS OF FALLING AND BEING INJURED WHEN LEFT ALONE IN THE HOSPITAL, DESPITE AND REGARDLESS [of] RISK ASSESSMENT PROTOCOL, AND WHERE STAFF LEAVE PLAINTIFF ALONE AND SHE THEN FALLS, STRIKING HER HEAD, AND SUSTAINING INJURY, THE CLAIM SOUNDS IN ORDINARY NEGLIGENCE AND NOT MEDICAL MALPRACTICE?

Further, in arguing that question in her brief on appeal, plaintiff nowhere contends, as the majority posits, that there was an "unsafe chair" or a "wet floor." She merely argues that "[a]n employee of Defendant placed a chair in the bathroom, in front of the sink, and left Plaintiff unattended to sit in the chair." Plaintiff's theory of liability is not, therefore, that there was an **[*31]** "unsafe chair" or a "wet floor," but rather that *due to plaintiff's underlying medical condition*, it was negligence to leave plaintiff unattended at all.

Therefore, in my view, the majority errs in going beyond the complaint, the question presented, and the argument on appeal, to fashion for plaintiff an ordinary negligence claim that is not only different from that alleged and argued, but that seemingly is not tied to any consideration of plaintiff's underlying condition. In doing so, the majority crafts a claim that is inconsistent with the plaintiff's own allegations and argument.[3]

> 3 The majority also errs, in my view, in re-casting the focus of plaintiff's claim on issues (an unalleged "unsafe chair" and a supposed "wet floor") that are nowhere referenced within the Question Presented on this appeal, and that thus should not even be considered. An appellant must identify the issues in her brief in the statement of questions presented. *MCR 7.212(C)(5)*; *Grand Rapids Employees Independent Union v Grand Rapids, 235 Mich App 398, 409-410; 597 NW2d 284 (1999)*. Ordinarily, we will not consider an issue that is not properly set forth in the statement of questions presented. *City of Lansing v Hartsuff, 213 Mich App 338, 352; 539 NW2d 781 (1995)*. **[*32]** In this case, it may have been appropriate for plaintiff not to have set forth these issues in the Question Presented, because plaintiff did not argue these issues on appeal. What is inappropriate is for the majority to have recast plaintiff's claim not only beyond plaintiff's complaint and argument on appeal, but beyond the question that plaintiff chose to frame for appeal.

But simply put, even apart from the majority's expansion of plaintiff's claim beyond that stated in the complaint and beyond that presented on appeal, an evaluation of whether defendant was negligent in supposedly placing plaintiff "in an unstable chair located on a wet floor" depends -- even in plaintiff's own estimation -- on an assessment of defendant's conduct *given plaintiff's known medical condition.*

The majority implicitly acknowledges this fact, stating: "McIver's care providers were aware of vulnerabilities that exposed her to an imminent risk of harm. Despite their knowledge that McIver suffered from debilitation and dementia and had a history of falls, hospital personnel allegedly left her unattended on a chair situated on a wet floor." *Ante* at . Therefore, even while ostensibly separating out an ordinary **[*33]** negligence claim as independently actionable (of any medical malpractice), the majority recognizes (without acknowledging the necessary consequence) that the ordinary negligence claim remains inextricably tied to an assessment of plaintiff's underlying medical condition.

Given that it admittedly was the very "vulnerabilities" and "history" deriving from plaintiff's medical condition that gave rise to the alleged "risk of harm" to plaintiff, the evaluation of plaintiff's negligence claim, in my opinion, necessarily raises "questions of medical judgment requiring expert testimony," *Bryant, 471 Mich at 423*, and therefore sounds exclusively in medical malpractice. The majority, in fact, agrees that "nursing assessments and the selection of fall precautions require professional judgments. Whether or not a sitter's services are necessary also constitutes a professional judgment." *Ante* at .[4]

> 4 The record reflects that defendant's staff was aware of plaintiff's diagnosis of multiple sclerosis and that plaintiff was at risk of fainting, unresponsiveness, seizures, and respiratory failure.

> During plaintiff's hospitalization, defendant's physicians regularly evaluated plaintiff. The physicians **[*34]** initially ordered that defendant be restrained by a lap belt and have a person sitting by her bedside (a sitter). An Acute Safety Restraint Order was issued to this effect on March 16, 2008; several such orders were issued during plaintiff's hospitalization, indicating that the continued need for such procedures was continually evaluated by defendant's staff. Ultimately, plaintiff's sitter was discontinued by her treating physician, in an order dated March 23, 2008. Charles W. Thomas, a registered nurse and employee of defendant, stated by affidavit that nurses use their professional medical judgment to provide each patient with a safe environment, to periodically perform assessments of patients, including "fall risk assessments," and put in place those methodologies that, based on experience will provide a safe environment for the patients. These measures may include, as they did with plaintiff, "physical restraints" and "safety sitters." Over the course of plaintiff's hospital stay, her condition was continually assessed by medical staff using their professional education, training, and experience. Upon continued assessments of plaintiff, those interventions were "continued, modified **[*35]** and ultimately discontinued." Whether those decisions were, in retrospect, correct is not relevant to this analysis. What is unmistakable, however, is that the propriety of the decision to discontinue those measures, in light of the medical professionals' assessment of plaintiff's then-existing risk of falling, necessarily "raises questions of medical judgment." In deciding whether the decision was wrong, a jury would therefore need expert testimony as to the appropriate medical standard of care. *Bryant, 471 Mich at 423, 425.*

The concurrence nonetheless posits that medical judgment would not be required to assess McIver's need for a sitter, if her debilitating condition was "apparent" or "observable" to her care providers. *Ante* at . But such a *non-medical* judgment (whether made by medical or non-medical personnel) necessarily would call into question defendant's prior *medical* judgment that McIver no longer needed a sitter. Moreover, the concurrence simultaneously argues both that McIver's medical condition was "irrelevant" to her claim, *ante* at , and that it is a "necessary component" that will "inform the jury's determination." *Ante* at . The concurrence (and the majority) **[*36]** simply cannot have it both ways. Since plaintiff's claim depends upon an assessment of whether defendant took appropriate precautions *in light of* plaintiff's underlying medical condition, there can be no independently actionable "ordinary negligence" claim; rather, plaintiff's claim sounds only in medical malpractice.

Bryant does not compel a different conclusion. In *Bryant, 471 Mich at 429*, our Supreme Court held that the claim that the defendant nursing home "failed to recognize that [the plaintiff's] bedding arrangements posed a risk of asphyxiation" sounded in medical malpractice.[5] The Court noted that the "restraining mechanisms appropriate for a given patient depend upon that patient's medical history." *Id.* Consequently, "[i]n order to determine . . . whether defendant has been negligent in assessing the risk posed by [the patient's] bedding arrangement, the fact-finder must rely on expert testimony." *Id. at 429-30.*

> 5 The Court in *Bryant* also rejected the plaintiff's claim that the defendant had "fail[ed] to assure that plaintiff's decedent was provided with an accident-free environment." *471 Mich at 425.* As the Court found, such a claim "is an assertion of strict liability that **[*37]** is not cognizable in either ordinary negligence or medical malpractice." *Id.* (emphasis in original). In my view, the majority's view comes dangerously close to imposing a regime of "strict liability."

Similarly here, and as plaintiff herself (and even the majority) recognizes, the question of whether defendant was negligent in its ongoing assessments of plaintiff's risk of falling, and in imposing, continuing, modifying, and ultimately discontinuing the safety mechanisms that it deemed appropriate in light of plaintiff's then-existing condition, is inextricably tied to its knowledge of her underlying medical condition. Answering that question therefore requires an evaluation of the medical judgment that formed the basis for those decisions, in light of that underlying condition and the progress of plaintiff's condition over the course of her hospital stay, and thus requires expert testimony. Plaintiff's claim accordingly sounds exclusively in medical malpractice.

The majority endeavors, unsuccessfully in my view, to squeeze plaintiff's claim (as rearticulated by the majority) into a narrow exception recognized in *Bryant.* Specifically, the plaintiff's decedent in *Bryant* had been found **[*38]** "tangled in her bedding and dangerously close to asphyxiating herself in the bed rails." *Id. at 430.* The plaintiff alleged that the defendant was negligent in failing to take any corrective action after learning of a hazard creating a known risk of imminent harm. The Court characterized this claim as "fundamentally unlike" the plaintiff's other claims, holding that "[n]o expert testimony is necessary to determine whether defendant's employees should have taken *some* sort of corrective action to prevent future harm after learning of the hazard." *Id. at 430-431* (emphasis in original).[6]

6 The concurrence asserts that I have "misread" and "distort[ed]" *Bryant*, and "disregard[ed] elementary tort principles." *Ante* at , . To the contrary, I believe that the concurrence would re-write *Bryant's* narrow exception into one that would swallow the rule. The concurrence's related citation to *Loweke v Ann Arbor Ceiling & Partition Co, LLC, 489 Mich 157; 809 NW2d 553 (2011)* is inapposite. Loweke did not, as the concurrence suggests, address whether "only one variety of negligence is actionable." *Ante* at . Nor, for that matter, have I; I have merely applied *Bryant. Loweke* instead distinguished **[*39]** between contract obligations and tort duties to non-contracting parties in the performance of a contract, something that is not at issue here.

Here, by contrast, there was no "learning of [any] hazard," no known risk of imminent harm, and no failure to take any corrective action. To the contrary, knowing of plaintiff's underlying medical condition, defendant continually evaluated plaintiff's condition, and adjusted its safety measures based on medical judgment. Unlike in the narrow exception of *Bryant*, plaintiff here is asking this Court to evaluate the propriety of the *extent* of the safety measures taken, and the wisdom of discontinuing the safety sitter, not the complete *lack* of action taken by defendant in the face of a known risk. To determine whether those judgments were proper, the jury would require expert testimony. Under these circumstances, therefore, plaintiff's claim sounds in medical malpractice.[7]

7 The hypothetical posed in *Bryant* similarly presumes that the defendant's employees had discovered a patient's risk of drowning, and that "[t]he nurse, then, does *nothing at all* to rectify the problem, and the resident drowns while taking a bath the next day." *Id. at 430*. The Court **[*40]** stated that "no expert testimony is necessary to show that the defendant acted negligently by failing to take any corrective action after learning of the problem" when the hypothetical plaintiff alleges that the defendant negligently "allowed the decedent to take a bath under conditions known to be hazardous." *Id.* Here, again, there is nothing remotely akin to those circumstances in the record before us.

This case is more akin to *Sturgis Bank and Trust Co v Hillsdale Community Health Center, 268 Mich App 484, 489; 708 NW2d 453 (2005)*. In *Sturgis*, the plaintiff's conservatee fell from her hospital bed, and plaintiff alleged that defendant's nurses were negligent in failing to prevent her fall, permitting her to rise unassisted, failing to protect her from falling, and failing to take correctives measures when they knew of her risk of falling. *Id. at 487*. This Court held that "[m]edical judgment is implicated in determining whether safeguards against a fall should have been implemented and in determining the extent of those safeguards."

As in the instant case, the issues in *Sturgis* involved the various factors taken into consideration when assessing a patient's risk of falling and determining **[*41]** which safety precautions to use when faced with such a patient. *Id.* This Court stated:

> While, at first glance, one might believe that medical judgment beyond the realm of common knowledge and experience is not necessary when considering [the plaintiff's conservatee's] troubled physical and mental state, the question becomes entangled in issues concerning . . . medications, the nature and seriousness of the closed-head injury, the degree of disorientation, and the various methods at a nurse's disposal in confronting a situation where a patient is at risk of falling. The deposition testimony indicates that there are numerous ways in which to address the risk . . . all of which entail some degree of nursing or medical knowledge. . . . *In sum, we find that, although some matters within the ordinary negligence count might arguably be within the knowledge of the layperson, medical judgment beyond the realm of common knowledge and experience would ultimately serve a role in resolving the allegations contained in this complaint. Accordingly, we find that the trial court did not err in dismissing the ordinary negligence claim.* [*Id.* (emphasis added).]

As noted above, the majority facially agrees **[*42]** with *Sturgis*, and holds that "the affidavit filed by defendant similarly supports that nursing assessments and the selection of fall precautions require professional judgments. Whether or not a sitter's services are necessary also constitutes a professional judgment." *Ante* at . But the majority then inexplicably departs from *Sturgis*, and reaches an inconsistent conclusion. I find this case to be indistinguishable from *Sturgis*, and would follow it. Accordingly, I would affirm the trial court's dismissal of plaintiff's claim for ordinary negligence in its entirety.

Finally, in allowing plaintiff's claim to go forward as an "ordinary negligence" claim, but ostensibly affirming

the circuit court's dismissal of plaintiff's unidentified aspects of plaintiff's negligence claim (as sounding in medical malpractice), the majority offers the following as somehow limiting of plaintiff's claim at trial:

> Thus, McIver is limited to proving that she fell in the manner set forth in the complaint, and that defendant's personnel unreasonably allowed her to remain unattended after seating her in an unstable chair located on a wet floor. [*Ante* at .]

As noted, however, plaintiff's complaint inextricably **[*43]** ties the alleged negligence to consideration of plaintiff's underlying medical condition. Consequently, limiting plaintiff to proving "that she fell in the manner set forth in the complaint" is no limitation at all. It essentially allows a medical malpractice claim to proceed under the guise of "ordinary negligence." To paraphrase an old adage, it "giveth back what the law hath taken away." Further, by re-characterizing plaintiff's claim, and the proofs to be shown at trial, as demonstrating that "defendant's personnel unreasonably allowed her to remain unattended after seating her in an unstable chair located on a wet floor," the majority actually expands plaintiff's claim beyond that which was asserted in plaintiff's own complaint.

Had the majority instead limited plaintiff to proving negligence without any reference at trial to her underlying medical condition, or to its effects or plaintiff's resultant propensities, then it is conceivably appropriate that an ordinary negligence claim might proceed without raising questions of medical judgment that require expert testimony. However, the majority's opinion does not so limit the proofs at trial.

Accordingly, I would affirm the circuit **[*44]** court's dismissal of plaintiff's claim in its entirety, and to the extent that the majority does not do so, I respectfully dissent.

/s/ Mark T. Boonstra

STATE OF MICHIGAN
IN THE SUPREME COURT OF MICHIGAN

AUDREY TROWELL,

Plaintiff/Appellee,

Michigan Supreme Court No:

Court of Appeals No: 327525

Oakland County Circuit Court
Lower Court No: 14-141798-NO
HON. COLLEEN A. O'BRIEN

-vs-

PROVIDENCE HOSPITAL AND MEDICAL CENTERS, INC., a Michigan Non-Profit Corporation,

Defendant/Appellant.

/

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PROOF OF SERVICE

STATE OF MICHIGAN)
):SS:
COUNTY OF WAYNE)

CURTINA MARTIN, being first duly sworn, deposes and says that on the 23rd day of September, 2016, she did serve a copy of DEFENDANT/APPELLANT PROVIDENCE HOSPITAL AND MEDICAL CENTERS, INC.'S APPLICATION FOR LEAVE TO APPEAL and PROOF OF SERVICE with the True Filing system which will send electronic notification to the following Attorney: CARLA D. AIKENS (P69530)

BY: /s/CURTINA MARTIN